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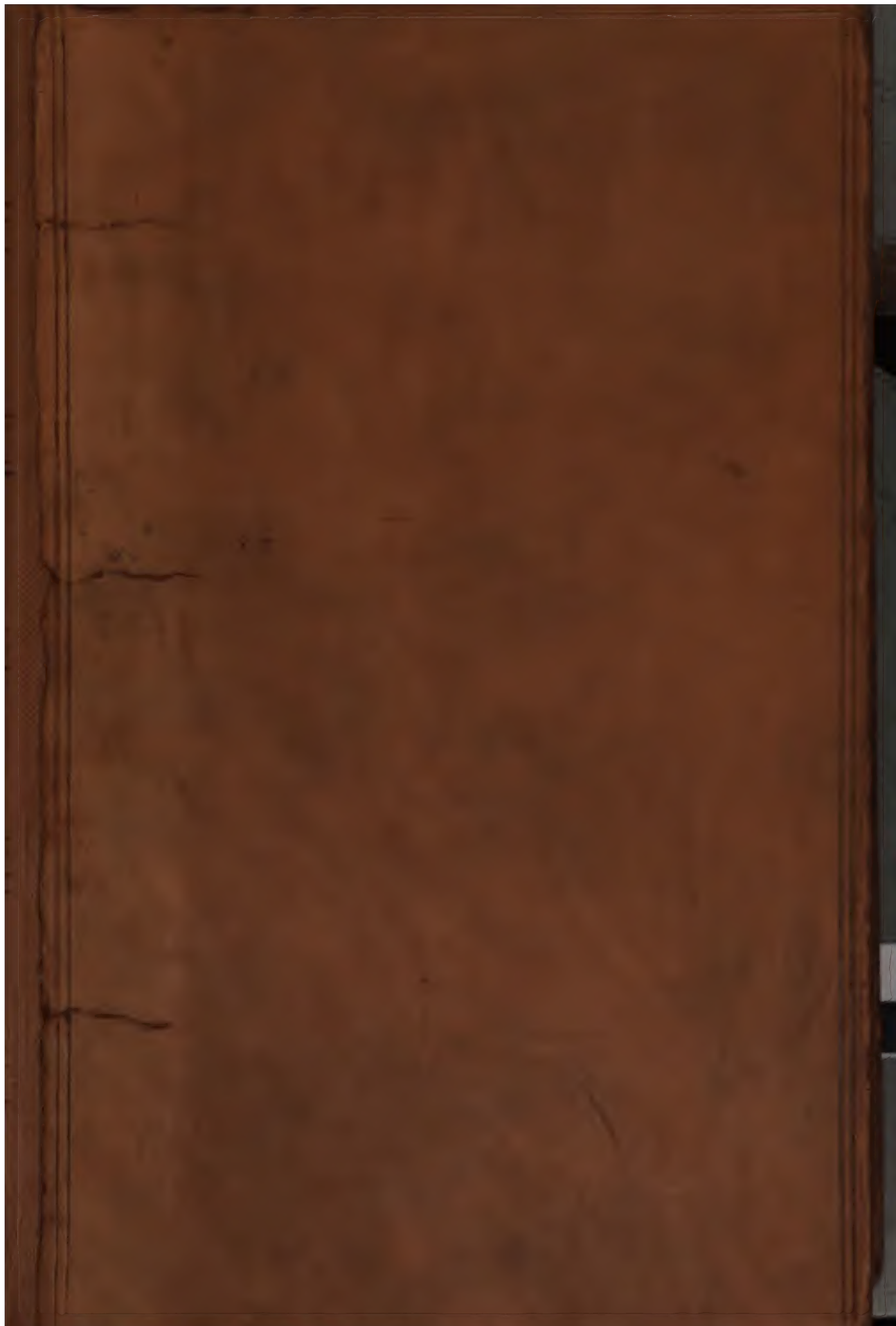
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REPORTS OF CASES
HEARD AND DETERMINED
BY
THE LORD CHANCELLOR,
AND THE
Court of Appeal in Chancery,

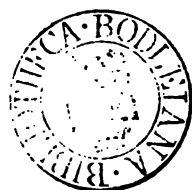
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THE CASES IN THIS VOLUME BEFORE THE LORD CHANCELLOR
ARE REPORTED BY
MESSRS. MACNAGHTEN & GORDON;
AND
THOSE BEFORE THE LORDS JUSTICES OF THE COURT OF APPEAL BY
MR. DE GEX.

VOL. V.
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REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

HIGH COURT OF CHANCERY.

COLES v. SIMS.

1854.

Jan. 16.

Before The
LORDS JUSTICES.

THIS was an appeal from an order of Vice-Chancellor *Wood*, upon a motion granting an injunction to restrain the Defendant from building in a manner at variance with a covenant.

On an agreement to sell part of a vendor's land, the vendor and purchaser entered into mutual covenants prohibiting building

The case is reported below in Mr. *Kay's* Reports, page 75, but a covenant for the payment of liquidated damages

except in a specified manner, on the sold and unsold parts, with a stipulation for payment of liquidated damages in case of breach of covenant:—*Held*,

1. That a subsequent owner of the unsold part, claiming through the grantor by means of deeds, one of which referred to the deed containing the prohibitory clause, but not to that clause, was bound by the prohibition in equity.

2. That the circumstance of the grantor not having performed a covenant, to obtain for the grantee a direct covenant from the former purchaser, did not constitute a defence, it not appearing that any application had been made to the grantor for that purpose.

3. That notice of a right to prevent building, and of an intention to enforce it, given before any expense was incurred, followed by a bill for an injunction, though not filed till four months afterwards, was sufficient to exclude a defence on the ground of laches, it appearing that the Plaintiff could not sooner establish his right to enforce the prohibition.

4. That the clause as to liquidated damages did not exclude the interference of the Court by interlocutory injunction.

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damages (*a*), on which the argument on the appeal mainly turned, is not there noticed, having for the first time been brought to the attention of the Court upon the appeal.

The following is a short summary of the facts of the case:—

By an Indenture, dated the 1st of *September* 1823, and made between *John Shewell*, of the one part, and *Samuel Morris*, of the other part, in consideration of 700*l.* to be paid to *John Shewell* by *Samuel Morris*, *Shewell*, for himself, his heirs, executors and administrators, covenanted with *Morris*, his heirs and assigns, to convey to him or them certain pieces of land, part of a larger piece belonging to *Shewell*. By the same deed *Morris*, (as to the pieces of land agreed to be conveyed to him,) for himself, his heirs, executors, administrators and assigns, covenanted with *Shewell*, his heirs and assigns, and *Shewell*, (so far as respected the rest of the land,) for himself, his heirs, executors, administrators and assigns, covenanted with *Morris*, his heirs and assigns, as follows; viz. that *Morris*, his heirs and assigns, should build two dwelling-houses on the pieces of land covenanted to be sold to him, to range with the fronts of all the messuages which should be thereafter built on the other parts of the land, with other stipulations as to the character and position of such buildings; and that no building of any other description whatsoever should at any time thereafter be erected, built or set up, in or upon or against the eastern front of the messuages, or any of them, or upon the said ground in front thereof, but that the ground on the eastern front of the messuages should be laid out as pleasure ground, and should be
for

(*a*) Set out *infra*, p. 3.

for ever thereafter used as a flower garden and pleasure ground, and that no shrub or tree should be planted in the same ground which should grow or extend ten feet in height from the ground. And *Shewell* covenanted not to dispose of any of the other parts of the piece of land unless subject to the like conditions and restrictions as to building. The agreement also contained the following covenant:—

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“ And the said *John Shewell* and *Samuel Morris* do hereby, for themselves, their heirs, executors and administrators, covenant to and with each other, that in default or nonperformance of all or any or either of the covenants and agreements hereinbefore contained on their respective parts, the party making such default or nonperformance shall pay to the other the sum of 100*l.*, to be recovered and recoverable as and for liquidated damages, as and for such default or nonperformance the jury having only to find the fact of all or any or either of the said covenants not having been performed as hereinbefore expressed.”

In *November* 1823, *Shewell* sold other part of the piece of land to *Thomas Jones*, and by indentures of lease and appointment and release dated respectively the 20th and 21st of *November* 1823, (after reciting the sale to *Morris*,) *Shewell*, in consideration of 1,800*l.*, appointed and conveyed such other part of the piece of land to *Thomas Jones*, his heirs and assigns for ever; and *Shewell* thereby, for himself, his heirs and assigns, covenanted with *Jones*, his heirs and assigns, that, in the several releases and appointments or other conveyances and assurances, which he should make and execute to the said *Samuel Morris* and other purchasers, and each of them, or to their heirs and assigns respectively, of the respective lots or lot of ground purchased, he the said

B 2

John

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John Shewell, his heirs and assigns, should require the said *Samuel Morris* and such other purchasers, and each of them, and their and each of their heirs and assigns, to enter on their and each of their parts and behalfs, to and with the said *Thomas Jones*, his heirs and assigns, into all and several the covenants, provisoes and agreements mentioned in the several contracts, so entered into by them for the purchase of their respective lot or lots of the said ground, or such of the said covenants, agreements and provisoes as should be then necessary and be in existence. And *Jones*, for himself, his heirs, executors and administrators, covenanted with *Shewell*, his heirs and assigns, that *Jones*, his heirs, appointees and assigns would, when and in case he or they should build a messuage or messuages on the said piece of garden ground thereby conveyed, erect the front thereof in a line with the said messuage erected or intended to be erected by *Morris*.

After several mesne conveyances, *Morris's* pieces of land became vested in the Plaintiff, and *Jones's* piece of land in the Defendants.

In *June* 1853, the Defendants pulled down one of the houses erected on the land to which they became entitled through *Jones*, and commenced building a Baptist chapel upon it, not so as to be in a line with the house erected by *Morris*.

In the same month the Plaintiff's solicitor stated to the Defendants, or one of them, that the Plaintiff objected to their building in a manner contrary to the stipulations of the deed of *November* 1823, and intended, if he could, to prevent their so doing.

In *October* 1853, the bill in the present suit was filed, praying

praying for an injunction to restrain the Defendants, their servants, agents and workmen, from proceeding with the building of the chapel upon the piece of ground beyond the front of the Plaintiff's house.

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The Vice-Chancellor made an order in the terms of the prayer of the bill.

Subsequently to the order of the Vice-Chancellor, an affidavit was filed, stating, that on the 21st of *December* 1853, the deponent applied to the solicitor of the vendors to know whether the deed of conveyance from *Shewell* to *Morris* contained any covenant on the part of Mr. *Morris* with *Thomas Jones*, and that the solicitor replied that it did not, and further said, that he was originally concerned for *Samuel Morris* and for *John Shewell*, and that there never was any covenant entered into by *Samuel Morris* with *Thomas Jones* respecting the ground and premises purchased by *Samuel Morris* or by *Thomas Jones* of *John Shewell*, and that the Deponent might see the original deed. That he did, on the 21st of *December* last, peruse the conveyance from *John Shewell* to *Samuel Morris*, and also inspected the several other title-deeds which the solicitors produced to him as those evidencing the title of the Plaintiff to the premises, and that no such covenant by *Samuel Morris* with *Thomas Jones* was contained in the conveyance to *Samuel Morris*, nor in any other deed or writing so shewn to him by the solicitor, but that there were in the conveyance to *Samuel Morris* covenants on the part of *Samuel Morris* with *John Shewell*, some of which were to the like effect as those alleged in the Plaintiff's bill to be contained in the contract of the 1st of *September* 1823, and others different therefrom, but that the deed of conveyance did not contain the covenant contained in the articles of agreement

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agreement of the 1st of *September* 1823, respecting liquidated damages.

A photographic impression from the building, which was the subject of complaint, was put in evidence.

Mr. *Bacon* and Mr. *Elderton* for the Appellants.

First, the Defendants had no notice of the covenant. Secondly, *Shewell*, through whom the Plaintiff claims, did not perform his part of the covenant, by procuring from all the persons to whom he sold portions of his lands covenants similar to those which he obtained from *Morris*. This circumstance of itself is sufficient to prevent any one claiming under him from enforcing it against persons claiming under the other party to the mutual covenant. A third ground, which ought to have been fatal to an application for an interlocutory injunction, is the delay which has taken place. A mere protest, not followed by active steps, was insufficient to rebut the presumption of acquiescence, arising from the Plaintiff standing by while the Defendants were laying out their money on the building. But there is a fourth ground, which was not submitted to the Vice-Chancellor, inasmuch as a complete copy of the deed of covenant had not then been obtained, and that is, that the parties themselves have provided a remedy, which excludes the interference of this Court, by entering into the covenant respecting liquidated damages. *Woodward v. Gyles* (a); *Shackle v. Baker* (b); *Rolfe v. Peterson* (c).

The following cases were also referred to:—*Sainter v. Ferguson* (d); *Jenkins v. Parkinson* (e); *Tulk v. Moxhay*

(a) 2 *Vern.* 119.

(b) 14 *Ves.* 468.

(c) 2 *Bro. P. C.* (Toml. edit.),
436.

(d) 1 *Mac. & G.* 286.

(e) 2 *Myl. & K.* 5.

Moxhay (a); Whatman v. Gibson (b); Mann v. Stephens (c).

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Mr. *Rolt* and Mr. *Faber*, for the Respondent, were not called upon.

The LORD JUSTICE KNIGHT BRUCE.

It is quite clear that the contract before us was intended by the parties to it, to bind the land into whatsoever hands it might come. This has not, indeed, been contested, nor could it reasonably have been so. But it has been made a question, whether, inasmuch as the present Defendants were not parties to the agreement, they are entitled to stand in a better position than the person under whom they claim, who was a party to the agreement. That is decided at once by an inspection of their conveyance, with a knowledge of the admitted facts; because the conveyance under which they take mentions the very agreement—the written instrument—containing the prohibition or clause in dispute, and, though not so as to recite that prohibition or clause, yet so, as upon all authority and principle, to give notice of the whole of its contents, at least in a case such as this, where the mention of the instrument is consistent with the supposition that the instrument may have contained such a clause. The Defendants therefore stand for every present purpose as much in Mr. *Shewell's* position as the Plaintiff stands in Mr. *Morris's* position.

Then arises the question, whether it is competent to any person to bind land perpetually in the sense and manner in which the land here is affected to be bound.

Now,

(a) 11 *Beav* 571; 2 *Phill*.
774.

(b) 9 *Sim*. 196.
(c) 15 *Sim*. 377.

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Now, *Tulk v. Moxhay* (a), as it was not the first so it is not the last case which decided that in a Court of Equity that may well be, whatever the state of the law with regard to covenants running with land in such cases, upon which it is not necessary for me now to say a word. I apprehend, therefore, that notwithstanding the doubt, or perhaps more than doubt, on such a point expressed by one authority, the course of this Court is now clearly understood to be to maintain such a covenant—such an agreement.

If so, there can remain but one question (subject to a point which I shall presently mention), viz., a question of laches or conduct. Now, the building here was intended to be begun in the month of *June* last, and in that month, as I understand, before any expense had been incurred on the ground in this respect, a gentleman, acting as solicitor for the Plaintiff and on his behalf, expressed to the Defendants, or one of them, the Plaintiff's opinion that the Defendants had no right to do the thing then intended (although the Plaintiff was not then in possession of the instrument which gave him the right of prohibition), and stated in clear terms the Plaintiff's objection and intention to prevent it if he could. It was in effect a plain and distinct protest against the course intended by the Defendants. Notwithstanding this, the Defendants built or continued to build. The protest never was withdrawn. The suit was not instituted until the end of the following *October*, a circumstance, which (if it were necessary to account for it), is accounted for by the want of proof under which the Plaintiff then laboured, of his title to effectuate the prohibition. The notice was, as I apprehend, sufficient; I must, therefore, hold the Defendants to have proceeded in their own wrong.

This

(a) 11 *Beav.* 571; 2 *Phill.* 774.

This was the entire case, as it came before the Vice-Chancellor, and, considering what the course of the Court has been, for the last five-and-twenty years and more, I am of opinion, that it was substantially before the Vice-Chancellor an undefended case. A point, however, has been brought before us, which was not before his Honor on account of the absence of an original document, that document, I believe, having been, without any wrong intention upon the part of any person, defectively set out. The defect consists in not having mentioned a clause providing that 100*l.* should be recoverable as liquidated damages, if either of the parties to the agreement should commit a breach of its stipulations, or any one or more of them. Now, this certainly raises a question, or may raise a question, open to reasonable argument, considering the various authorities, not only in equity but also at law. If I were now deciding the cause, I should probably come to the conclusion, that in a case where a covenant is protected (if I may use the expression), by a provision for liquidated damages, it must be in the judicial discretion of the Court, according to the contents of the whole instrument and the nature and circumstances of the particular instance, whether to hold itself bound or not bound, upon the ground of it, to refuse an injunction if otherwise proper to be granted; and that, in the present case, the circumstances are such as to render it right for the Court to grant an injunction. It is not, however, necessary now to decide the point. The cause is before the Court only upon an interlocutory motion, and, in my opinion, there are amply sufficient grounds on which to grant an injunction until the hearing of the cause, when this point and any other which the Defendants may wish to raise or to raise again may be decided.

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At present all we have to do is to say, whether there is a *primâ facie* case for an injunction, and whether more mischief

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mischief will be done by granting than by withholding it. I am of opinion that the mischief possible to arise from continuing it does not preponderate over that which would be caused by refusing it.

The LORD JUSTICE TURNER.

The Defendants' argument upon this motion has been rested on four points.

First, it was not denied that a party having notice of a covenant of this description would be affected by that notice. That could not be denied after the decision in *Tulk v. Moxhay*; but it was said that the Defendants had no notice of the covenant. Now it appears not only that a conveyance, under which the Defendants claim, expressly refers to the agreement which contains the prohibitory clause, but that the agreement containing that clause or a copy of it, was in the possession of the Defendants' solicitor. It is impossible, in this state of circumstances, successfully to deny notice.

The second point is, that the Plaintiff stands in the place of *Shewell*, and that *Shewell* was under a covenant with *Jones* to procure *Morris* to execute or enter into certain covenants with *Jones*, and that this was not done. What the effect of this might have been if it had been shewn that *Shewell* had been applied to by *Jones*, or by any person acting for him, to procure *Morris* to join, and *Morris* had refused to do so, it is not necessary to say; but I take it that the party who insists on the point must shew that application was made to the other party to join in the covenant.

The third point is upon the question of liquidated damages. I agree with my learned brother, that it is not necessary to give any conclusive opinion on that subject;

subject; but if it were, I strongly incline to think that this is not a clause for liquidated damages excluding the jurisdiction of this Court. The question in such cases, as I conceive, is, whether the clause is inserted by way of penalty, or whether it amounts to a stipulation for liberty to do a certain act on the payment of a certain sum. This clause applies, not merely to the particular provision of the agreement which is in question upon this motion, but to all the provisions and covenants contained in the agreement, and therefore resembles a common penalty clause. It is sufficient, however, to say that it would be going too far upon an interlocutory application of this kind to dissolve the injunction upon this ground.

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The fourth point is on the delay. The parties here have proceeded to erect this building, but under what circumstances? They had distinct notice of a protest on the part of the Plaintiff before the buildings were commenced, and they had, during the whole time, in their possession, the agreement, which (according to the view we at present take of the case) prevented them from so building.

I think, therefore, that this injunction must be maintained: costs to be costs in the cause.

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Where an indorsement on a promissory note of payment of interest, made by the authority of a deceased holder, appears to have been made after the Statute of Limitations had run, it is not evidence to exclude the operation of the statute.

Where the Statute of Limitations had run against a debt, due from a testator before his death, and the executor wrote thus to the creditor, "The legatees object to my paying the claim though I think it just," and "I

not only do not dispute the claim, but admit it, thinking it just, but am compelled to refuse payment without an order of the Court."—*Hell*, that the debt was not revived, and that the real estate could not be subjected to it by any act of the devisees in trust, though they were also executors.

Where an executor does not set up the Statute of Limitations on a creditor's administration summons, the residuary legatees cannot set it up against the Plaintiff.

Secus, as to cestuis que trustent of devised estates, who would have been necessary Defendants but for the Chancery Amendment Act.

BRIGGS v. WILSON.

THIS was an appeal from a decision of the Master of the Rolls refusing to vary a certificate of his Honor's chief clerk, on an inquiry directed by the usual order on an administration summons. The case is reported in the 17th Volume of Mr. *Beavan's* Reports, page 330, but the grounds on which the case was argued and decided upon appeal render a fuller statement of the facts necessary for the present report.

Under the administration order advertisements were issued, calling upon creditors to come in and prove their debts, and thereupon the Plaintiff brought in his claim. Affidavits were filed in support of and in opposition to it, and witnesses were examined orally with a view to support the Plaintiff's case; the questions being, whether the real and personal estates of *Overton Adlard*, the testator in the cause, or either of those estates, could now be made liable to the payment of two sums of 500*l.* and 92*l.* 8*s.*, secured by the testator's promissory notes or of either of those sums, and if so, what interest (if any) was payable on the notes.

The note for 500*l.* bore date the 13th of *May* 1815, and

and was made payable to Mrs. *Elizabeth Sutton*, or order, on demand with lawful interest for the same : and there was the following indorsement on the note—" Interest on this note paid up to the 13th day of *May* 1825."

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The facts established by the evidence were as follows:—*Elizabeth Sutton* (the payee of the note) was the mother of the testator *Overton Adlard*. The indorsement on the note was in the handwriting of one *Thomas Cram*, who was the clerk of the parish where the maker and payee of the note resided, and who appeared to have been on terms of intimacy with *Overton Adlard* the maker, and to have transacted business both for him and for *Elizabeth Sutton* the payee. *Cram* died in *April* 1850, and there was no evidence to shew when and under what circumstances and by what authority the indorsement was written by him. The note for 92*l.* 8*s.* was dated the 28th of *November* 1826, and was made payable to Mrs. *Elizabeth Sutton*, or order, on demand with interest at 4*l.* per cent. from the date ; and on this note there was no indorsement.

Overton Adlard died in *August* 1829, having by his will directed his trustees to convert his real estate into money, and to hold the produce (among other trusts) upon trust to pay and discharge all such of his debts as might have been due and owing by him at his decease, and as his personal estate might have been insufficient to discharge with such sums for interest as his trustees might think right and equitable.

It appeared by the evidence of Mr. *Wilson* (one of the trustees) that both the notes were placed in the hands of Mr. *Wilson* by Mrs. *Sutton* in the lifetime of *Overton Adlard*—[Mr. *Wilson* said about the years 1825, 1826, or 1827]—for protection ; and in a letter written by
 Mr.

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Mr. *Wilson* it was stated that the note for 500*l.* had the above indorsement upon it when it was so deposited with him. He also stated that the notes remained with him for three or four years, but were then withdrawn by Mrs. *Sutton*, and were again deposited with him in 1830, and that they were presented to him as a claim by Mrs. *Sutton* against the testator's estate shortly after the testator's death.

*Thomas Sutton*, the husband of *Elizabeth Sutton*, died in 1833, and in the year 1841 she married the Plaintiff *William Briggs*. She died in *January* 1851. In *December* 1852 the Plaintiff by his solicitor applied by letter to *Wilson*, who had then become the surviving trustee and executor under the will of *Overton Adlard* for payment of the 500*l.*, with interest at 5*l.* per cent. from the 13th of *May* 1825, and of the 92*l.* 8*s.* with interest from the 28th of *November* 1826, the date of the note for that sum, and in answer to this application *Wilson* wrote the following letter :—

“ *Alford, Tuesday Evening.*

“ My dear Sir,—Had I not been so much engaged I should have replied to your former letter. I regret much the necessity for Mr. *Briggs's* proceedings against me, as *Adlard's* executor, but what can I do between two fires? The legatees (through Messrs. *Walker* and Sons) threaten me, or at least do not assent to my paying Mr. *Briggs's* claim, though I confess I think it just in law and equity. I have therefore only to say the sooner the Court decide the matter the better shall I be satisfied.

“ Yours truly, *H. Wilson.*”

“ *L. J. Brackenbury*, Solicitor, *Alford.*”

In consequence of this reply a summons for the administration of the real and personal estate of *Overton Adlard*

*Adlard* was taken out under the Chancery Procedure Act; and on the 8th of *January* 1853, when the case was coming on for hearing, the Plaintiff's solicitor wrote again to *Wilson* in these terms:—

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“ *Briggs v. Yourself.*

“ *Alford, 4th January 1853.*

“ Dear Sir,—As this case will come on for hearing on Saturday next, I shall feel obliged by your informing me whether it is your intention to dispute the validity of my client's claim, and whether you intend to raise the question of the Statute of Limitations, as being a bar to the debt sought to be established against the estate of *Overton Adlard*, deceased. Awaiting your reply,

“ I am yours truly,

“ *Langley Joseph Brackenbury.*”

“ To *Hy. Wilson, Esq., Solicitor, Alford.*”

Mr. *Wilson* replied to this letter as follows:—

“ *Alford, 4th January 1853.*

Dear Sir,—I not only do not dispute Mr. *Briggs's* claim, but I admit it, thinking the claim just; but I am compelled to refuse payment without an order of Court, and I much regret the necessity.

“ Yours very truly,

“ *L. J. Brackenbury, Esq.*”

“ *H. Wilson.*”

On the 15th of *January* 1853, the usual decree for the administration of the estate was made. Under this decree the chief clerk of the Master of the Rolls made a separate certificate, by which he found that there was due to the Plaintiff from the estate of *Overton Adlard*, deceased, on the promissory note dated the 13th of *May* 1815, 500*l.*, and on the promissory note dated the 28th of *November* 1826, 92*l.* 8*s.*, with interest thereon from the

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28th of *November* 1826: and the Master of the Rolls having refused to discharge the certificate, upon the motion of the residuary legatee of *Overton Adlard*, who had been allowed to attend the proceedings under the decree, the case came before their Lordships upon appeal from the decision of the Master of the Rolls.

Mr. *Lee* and Mr. *Henderson* in support of the appeal.

In the first place, we object to the mode in which this order has been made. The Master of the Rolls had decided the principle in chambers, but his Honor required a formal motion to be made before him in Court, for the purpose of making an order from which an appeal could be brought. We submit that the order ought to have been made at once in chambers. —[Mr. *R. Palmer* for the Respondent referred to *Rhodes v. Ibbetson* (a).]— On the merits we submit that the debts are barred by the Statute of Limitations. As to the note for 500*l.* there is no evidence to shew that the payee ever authorized the acknowledgment to be made which appears written upon the back of it. But if an authority had been proved, still as the memorandum was written after the statute had run, it would not be sufficient. The ground on which a memorandum made by the payee before the statute has run is evidence of payment is, that it is an acknowledgment against his interest. That reason does not apply to a case in which the statute had already run. The distinction has been acted upon in *Rose v. Bryant* (b), *Turner v. Crisp* (c), *Searle v. Lord Barrington* (d), *Glyn v. Bank of England* (e). They also referred to and commented on *Gregory v. Parker* (f), *Cripps v. Davis* (g), *Hart v. Prendergast* (h).

Mr.

(a) 4 *De G. Mac. & G.* 787.

(b) 2 *Campb.* 321.

(c) 2 *Str.* 827.

(d) 2 *Str.* 826.

(e) 2 *Ves. sen.* 38.

(f) 1 *Campb.* 394.

(g) 12 *M. & W.* 159.

(h) 14 *M. & W.* 741.

Mr. *Roundell Palmer* and Mr. *Regnier Moore*, for the Respondents.

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The executor in this case has not set up the statute, and it is not competent therefore for the Appellant, who is only a residuary legatee, to set it up.—[The LORD JUSTICE KNIGHT BRUCE:—Could the executor's admission affect the real estate?—We rely on that as to the personal estate only. As to the real estate, we rely on Mr. *Wilson's* written acknowledgments as trustee. But if we are remitted to the question of law as to the indorsements, there is in our favour the decision of the House of Lords in *Bosworth v. Cotchett* (a).—[The LORD JUSTICE KNIGHT BRUCE sent for the Journals of the House of Lords (b), and read from them the statement of

(a) House of Lords, May 6, 1824; 3 *Stark. on Evidence*, 824 (3rd edit.) note (k).

(b) House of Lords Journals, Vol. 56, May 6, 1824, p. 196.

The House proceeded to take into further consideration the writ of error wherein *John Bosworth* and *Robert Parr* are Plaintiffs and *Thomas Cotchett* is Defendant.

And consideration being had thereof, the following order and judgment was made:—

Whereas by virtue of his Majesty's writ of error, returnable into the House of Lords in parliament assembled, a record of the Court of King's Bench was brought into this House on the 16th of February 1821, wherein *John Bosworth* and *Robert Parr*, executors of *George Loseby*, deceased, are Plaintiffs, and *Thomas Cotchett* is Defendant, in order to

reverse a judgment given in the Court of King's Bench for the said Defendant, and counsel having been heard on Wednesday, the 31st day of March last, to argue the errors assigned upon the said writ of error, and due consideration had this day of what was offered on either side in this cause:

It is ordered and adjudged by the lords spiritual and temporal in parliament assembled, that the said judgment given in the Court of King's Bench for the said Defendant be and the same is hereby reversed: and it is further ordered, that the said Court do award a venire facias de novo, and proceed according to law, and that the record be remitted into the said Court of King's Bench:

The tenor of which judgment

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1854. of *Bosworth v. Cotchett*.] They also referred to *Smith*  
 v. *Battens* (a.)  
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 WILSON. Mr. *Lee*, in reply, referred to *Shewen v. Vander-*  
*horst* (b).

Judgment reserved.

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 Jan. 20. the case, nearly in the words in which they are above  
 narrated, proceeded as follows :—

The questions before us depend upon the point whether  
 the Statute of Limitations operate to bar these claims ;  
 and this point admits of different considerations with  
 reference to the different notes.

As to the note for 500*l.*, all claim upon that note must  
 have been barred by the statute unless the indorsement  
 upon the note operated to prevent the bar ; and the first  
 question therefore is, what is the effect of that indorse-  
 ment ?

to be affixed to the transcript of  
 the record is as follows, viz. :—  
 “ On which day, before our Lord  
 “ the King and the Peers in the  
 “ same Court of Parliament now  
 “ here at *Westminster*, in the said  
 “ county of *Middlesex*, assembled,  
 “ come as well the said *John Bos-*  
 “ *worth* and *Robert Parr*, exe-  
 “ cutors of *George Loseby*, as  
 “ also the said *Thomas Cotchett*,  
 “ by their attornies aforesaid :  
 “ whereupon all and singular the  
 “ premises having been seen and  
 “ by the said Court of Parlia-  
 “ ment fully understood, as well  
 “ the record and proceedings  
 “ aforesaid as the several matters

“ above assigned for error by the  
 “ said *John* and *Robert*, exe-  
 “ cutors as aforesaid, being dili-  
 “ gently examined and mature  
 “ deliberation being thereupon  
 “ had ; it appears to the said  
 “ Court of Parliament now here  
 “ that the judgment given in the  
 “ said Court of King's Bench is  
 “ erroneous, and that the same  
 “ be and the same is hereby ac-  
 “ cordingly reversed, and that  
 “ the said Court of King's Bench  
 “ do award a *venire facias de*  
 “ *novo* and proceed according to  
 “ law.”

(a) 1 *Moo. & Rob.* 341.

(b) 2 *Russ. & Myl.* 75.

ment? I am of opinion both upon principle and authority that under the circumstances before us the indorsement does not take the case out of the operation of the statute. Upon the evidence in this case we should not, I think, be justified in considering that this indorsement was made by the authority of *Overton Adlard*; but I assume, for the purpose of this question, that it was made by the authority of *Elizabeth Sutton*, and is to be considered as her indorsement. Such indorsements made by the holders of notes and other instruments are receivable in evidence upon this principle, and upon this principle only, that they operate against the interest of the party by whom they are made. When made before the Statute of Limitations can have operated they have clearly this effect, being admissions, by the parties making them, of money received by them. But if they are made after the time when the Statute of Limitations may have operated, so far from operating against the interest of the parties by whom they have been made, they may operate directly in favour of their interests; as the effect of them, if admitted in evidence, may be to create a right to recover both principal and interest, where, in the absence of them, neither principal nor interest could be recovered. In such cases, therefore, the principle upon which such indorsements have been received in evidence fails; and that is the case before us, for it is clear that the indorsement upon this note must be taken to have been made after the 13th of *May* 1825.

With respect to the authorities upon the question, I think that upon examining them, they will be found fully to bear out this distinction as to the admissibility or non-admissibility of such indorsements, in evidence, according as they may have been made before or after the Statute of Limitations can have operated. For, it appears, from what was said by Baron *Bayley* in *Gleadow v.*

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*Atkin* (a), that in *Searle v. Barrington* (b), evidence was given of the time when the indorsements were made, and no such evidence could have been necessary if such indorsements were receivable in evidence, at whatever time they might have been made. And in *Turner v. Crisp* (c), the indorsement of receipt of part of a bond after the presumption of payment had arisen, was refused to be received in evidence. Again, Lord *Hardwicke* adverts to the distinction as to the time when the indorsements were made in *Glynn v. The Bank of England* (d); and, in *Rose v. Bryant* (e), Lord *Ellenborough* appears to have gone so far as to have intimated that the indorsements could not be properly admitted, unless they were proved to have been written at a time when the effect of them was clearly in contradiction to the writer's interest. It is true, that in the subsequent case of *Bosworth v. Cotchett* (f), they were received without extrinsic proof of the times when they were made; but I collect from the meagre note which we have of the case of *Bosworth v. Cotchett*, that, there, the indorsements were dated, and, in that case, they would be presumed to have been written when they bore date; *Smith v. Battens* (g). And it does not appear that they were dated after the time when the statute would have run. The case, therefore, goes no further than to shew that such indorsements as these may be received in evidence, without extrinsic proof of the times when they were made; it does not shew that they ought to be received, when it appears, as in the case before us, that they were made after the time when the statute had taken effect. This note, therefore, notwithstanding the indorsement, was barred by

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|--------------------------------------|--------------------------------------------------|
| (a) 1 Cr. M. & R. 421.               | (d) 2 Ves. sen. 38, 43.                          |
| (b) 2 Str. 826; 8 Mod. 278;          | (e) 2 Camp. 321.                                 |
| 2 Lord Raym. 1370; 3 Bro. P. C. 593. | (f) 3 Stark. on Evidence, 824 (3rd edit.), note. |
| (c) 2 Str. 827.                      | (g) 1 Mood. & Rob. 341.                          |

by the statute at the death of the testator. And having been so barred, the trust created by the will for the payment of the debts did not revive it.

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We have to consider then, whether the bar created by the statute has been removed by what subsequently passed. The letters of the Defendant were relied upon for this purpose, but I do not think that they are sufficient to take the case out of the operation of the statute; for, although they acknowledge the debt to be just, they are couched in terms, which prevent any promise to pay being inferred from them, and the modern cases appear to me to have settled that such acknowledgments are not effectual against the provisions of the statute. I refer particularly to *M<sup>c</sup>Culloch v. Dawes (a)*.

If, therefore, the Statute of Limitations had been set up in this case, I should have thought that this 500*l.* note was barred, both as to the real and the personal estate. But the Defendant, who is both executor and devisee in trust, has not set up the statute; and as to the personal estate, it is not, I think, competent to the parties, moving before us, who, as to that estate, are merely in the situation of residuary legatees, now to set it up against the Plaintiff in this suit, whatever may be their right as against other creditors; *Ex parte Dewdney (b)*. The case of *Shewen v. Vanderhorst (c)*, which was referred to on this point, was no authority for such a right in this case, for there the bill was filed and the decree obtained by the residuary legatees.

As to the real estate, however, I think the case is different; these parties would formerly have been necessary parties

(a) 9 *Dowl. & Ry.* 40.

(b) 15 *Ves.* 498.

(c) 1 *Russ. & Myl.* 347; and  
 2 *Russ. & Myl.* 75.

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parties to the suit instituted by the Plaintiff. If they had been parties, they might have set up the statute, and I do not think that they ought to be placed in a worse position in consequence of the Court and the legislature having, for the purpose of saving expense, dispensed with their being parties. Having obtained leave to attend the proceedings under the decree, I think it was open to them to set up the statute against the Plaintiff as they might have done by answer.

The true result, therefore, of this part of the case, appears to me to be, that this note is wholly barred as to the real estate, but is not, in any manner, barred as to the personal.

As to the note for 92*l.* 8*s.* This note was not barred at the death of the testator. For the same reason, as applies, with respect to the other note, it is not now barred as against the personal estate; and it has been kept alive by the trust as against the real estate; I think, therefore, that the certificate is right in respect of this note.

*The LORD JUSTICE KNIGHT BRUCE.*

Thinking, as I do, that we ought to follow the case of *Gaters v. Madeley (a)*, which decides a point, perhaps, of some difficulty, this appeal appears to me incapable of being supported as far as the personal estate of the testator is concerned; the letters written by his surviving executor since the year 1850, having, in my opinion, effectually precluded any defence founded on the Statute of Limitations to that extent.

And

(a) 6 *M. & W.* 423.

And with respect to the smaller note in question, that of 1826, the testator having died in 1829, the year in which the will charging his real estate was made, the appeal seems to me to fail also as to the real estate. It was, I believe, alleged and admitted at the bar, that the testator's only real estate consisted of lands of which his mother was tenant for life in possession, by a title of course independent of his will.

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But as concerning the larger note in litigation, that of 1815, I consider the matter to stand, with regard to the real estate, differently. I do not enter into the question of the admissibility, in evidence, of the words, "Interest on this note paid up to the 13th day of *May* 1825," written on the note probably by *Thomas Cram*, who seems to have been a person sometimes employed by Mrs. *Briggs*, or her son or both, and to some extent in their confidence. Without intimating any opinion for or against their admissibility, I assume it. But I find myself unable to attribute any weight to them in the controversy. Nothing is known of the time when, or the circumstances under which, this memorandum or sentence was written, except so far as an inference may be drawn from the date that it mentions (a date, I need not say, more than six years later than that of the note) as to the time of the writing.

It seems to me not proved directly or circumstantially, that the testator authorized the making of the memorandum or recognized it. And, subject to what I am about to state as to Mrs. *Briggs*, the same may, I think, be said of *Sutton*, who, from some time in the year 1815 to some time in the year 1833, was her husband. It may be, and probably is, true, that when, between the year 1823 and the year 1828, the note of 1815 was delivered by that lady to Mr. *Henry Wilson*, the memorandum

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random was upon it, and that she, by her conduct then and otherwise, did, on her own and *Sutton's* behalf, or on the behalf of one of them, recognize the memorandum. But subject to that remark, neither is it shewn that she authorized the making of the memorandum or recognized it. In my opinion it would be unsafe, and is not incumbent on us to rely, and I decline placing any reliance on this memorandum. But there is, independently of it, nothing to shew that the Statute of Limitations might not, and I conceive that it could have been, in the year 1822, and from that time to the death of the testator, effectually and successfully pleaded by him to an action against him upon the note of 1815, brought after the year 1821. I think, consequently, that the real estate was not charged with it by the will, and could not be subjected to it by any act, of either or both of the trustees, though the trustees were executors also.

To this extent, therefore, I dissent from the certificate before us. Our order, on the present occasion, varying so far the order under appeal, may, perhaps, not improperly be expressed to be without prejudice to any question of marshalling, a point which I have not intended to touch, and as to which, if it can and shall be raised in this proceeding, it may be well to refer to a case of *Fordham v. Wallis* (a), decided by my learned brother, I think, in the very early part of last year, and the authorities mentioned by him on that occasion.

(a) 10 *Hare*, 217.

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In the Matter of WYLDE a Lunatic.

**T**HIS was a petition presented by the executors of a deceased lunatic, for the payment to them of the balance which had been paid into Court by the committee of the estate, and the only question was, whether the petition ought to have been served on the committee, he having passed his accounts, and his sureties having been discharged.

Jan. 31.  
Before *The*  
LORDS JUSTICES.

A petition presented after the death of a lunatic by his executors, for payment of the balance paid into Court, must be served on the committee, although he has passed his accounts and his security has been discharged.

The 44th Order in Lunacy of the 7th *November* 1853, directs, that “Where a lunatic dies, the Masters are to take and pass the account of the committee of the estate of his receipts and payments for and on account of the late lunatic and his estate, from his appointment or from the foot of his then last account passed in the matter up to the day of the decease of the late lunatic: and the balance (if any) which the Masters may certify to be due from the committee on passing the aforesaid account, is to be paid by him to the legal personal representatives of the late lunatic, to be by them applied in a due course of administration; and upon payment of the aforesaid balance (if any) by the committee in the manner aforesaid, or in case there shall not be a balance found due from the committee, or in case the taking and passing of the account is not required, and may in the opinion of the Masters be properly dispensed with, then his security is to be discharged.”

Mr. *Dickinson* supported the Petition.

Their LORDSHIPS held that the committee must be served.

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In the Matter of the NORTHERN and SOUTHERN  
CONNECTING RAILWAY COMPANY, and  
in the Matter of the JOINT-STOCK COM-  
PANIES WINDING-UP ACTS.

MERCER'S CASE.

Feb. 9.

Before The  
Lords Jus-  
tices.

*Seemle*, that  
where an  
"alleged con-  
tributory" (not  
settled on the  
list) is sum-  
moned as a  
witness, his  
travelling ex-  
penses ought  
to be tendered  
to him.

But where  
an "alleged  
contributory,"  
who declined  
to sign a pro-  
posed admis-  
sion of his  
execution of  
the Company's  
deed, was  
served with a  
summons to  
attend as a  
witness, and  
did not de-  
mand his ex-  
penses, but  
disobeyed the  
summons, and  
there appeared  
every proba-  
bility of his

being a contributory,—*Held*, that he was not entitled to the costs of a motion to  
commit him, which it became unnecessary to dispose of on the merits, from his  
making, in Court, the required admission.

THIS was an appeal from the refusal of Vice-Chan-  
cellor *Stuart* to commit the Respondent, Mr.  
*Fletcher Mercer*, for contempt in disobeying a summons  
to attend as a witness before the Master in the above  
matter.

The case is reported below, in the second volume of  
Messrs. *Smale & Giffard's Reports*, page 87, where the  
facts are stated. The following summary will explain  
the point on which the appeal turned :—

The Respondent was applied to on behalf of the  
official manager to admit his execution of the Company's  
deed, and was informed that, if he did not, the costs of  
proving the execution would come out of the assets. He  
declined to make the admission, and was served with a  
summons to attend before the Master, according to the  
provisions of the 63rd section of the Joint-Stock Com-  
panies Winding-up Act of 1848. He failed to obey the  
summons, whereupon the official manager moved to com-  
mit him for contempt. The Vice-Chancellor held that,  
as the Respondent's travelling expenses had not been  
tendered

tendered to him, his failure to attend did not amount to a contempt. On the appeal coming on their Lordships inquired whether Mr. *Mercer* denied his execution of the deed, and, on his counsel admitting the execution of it, the only question was as to the costs of the original and appeal motions.

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 CASE.

Mr. *Roxburgh*, for the Appellant (the official manager).

The demand of the Respondent was untenable. The 63rd & 64th sections of the Winding-up Act, 1848, render it imperative on a contributory to attend without payment of expenses, and by the Winding-up Act of 1849, the word "contributory" is defined to mean an "alleged contributory." He was, therefore, only entitled under the act to such costs as the Master should think fit. It was impossible in this state of circumstances to tender him his costs. The order for commitment ought therefore to have been made.

Mr. *Daniel* and Mr. *Hetherington*, for the Respondent.

The latter part of the 64th clause only applies to persons settled on the list of contributories. The Respondent was, under the former part of the section, entitled to costs in the same way as a witness at law. Until his travelling expenses were tendered he was not bound to attend, and his omission to do so was no contempt.

They referred to *Fuller v. Prentice* (a).

Mr. *Roxburgh* in reply.

*The*

(a) 1 H. Black. 49.



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 CASE.
*The LORD JUSTICE KNIGHT BRUCE.*

The question of construction upon this Act of Parliament is one of considerable difficulty, and I would rather not, without necessity, give an opinion upon it. I think that the present case does not create that necessity.

Assuming the official manager to be right in his contention, I think that the particular language of the statute and the novelty of the case are such (that is, as far as decision goes, for I am not aware of any decision upon the point) as to justify us in relieving Mr. *Mercer* from the costs and in giving the costs of the official manager out of the estate. On the other hand, if upon the mere point of law Mr. *Mercer* is right, still, considering that he did not ask for the expenses of his journey, considering that they could not have been of importance to a gentleman in his condition in life; considering, moreover, that he declined to sign the admissions which he was asked to sign, and which he has now signed; and considering lastly, that in all probability he must be deemed to be a contributory, I think that he should have no costs.

My conclusion, therefore, is, that as to both motions the official manager should have his costs out of the estate, and that as to Mr. *Mercer* he should have costs of neither.

*The LORD JUSTICE TURNER.*

It seems to me that the 9th section of the Act of 1849 has no application whatever to this question, and that it depends entirely on the 64th section of the Act of 1848. If it was necessary to decide the point, I am very much disposed to think that the official manager was wrong in not having tendered the costs under the 64th section of the Act of 1848. The first branch of the section is,  
 "That every person summoned before the Master as a  
 witness

witness shall be entitled to such costs and charges as are by law allowed to witnesses ;" and the costs and charges which are by law allowed to witnesses are costs and charges which are payable to them immediately upon their being served with a summons. The second branch of the section is, " But that where any person who at the time of the order absolute was a contributory of such Company shall be summoned as aforesaid, every such person shall have such costs and charges only, if any, as the Master in his discretion shall think fit." And I incline to the construction of the act for which Mr. *Daniel* has contended, viz., that this second branch of the section applies to persons who have been ascertained to be contributories. Otherwise the operation of the first branch of the section would, as it seems to me, be wholly prevented ; for it must be impossible to say when a person is served before he is upon the list of contributories, whether he will or will not have been a contributory at the time of the order absolute being made. I give no opinion on the question whether it may not be competent for the Master to suspend payment of costs to a witness before that witness is summoned. The act may have contemplated cases in which there might be no funds enabling the official manager to pay the costs of witnesses necessary to be examined for the purpose of ascertaining the amount of the assets of the Company, and the latter part of the clause may have been intended to provide for such cases by empowering the Master to suspend payment of costs.

Although, however, if it was necessary to decide the question, I should probably hold that the official manager was wrong in not tendering the costs to the witness at the time of the summons being served upon him, still, as Mr. *Mercer* was served with the summons and also with the proposed admission, and well knew, as he must have

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CASE.

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have done from the tender of the admission, the purpose for which he was summoned, I cannot consider him as having acted rightly in not having taken any notice either of the summons or of the admission. I think that he is not entitled to any costs, because it is his conduct which has led to the application. My opinion concurs with that of my learned brother, that the costs of the official manager ought to come out of the estate, and that Mr. *Mercer* should have no costs of the application.

In the Matter of CATHERINE CUMMING (late a Lunatic), Deceased.

Feb. 10.

Before The  
LORDS JUSTICES.

The costs of issuing a commission of lunacy, if for the lunatic's benefit and after the lunatic's death, may be proved against the lunatic's estate, notwithstanding the pendency of a traverse of the inquisition.

THIS was a suit to administer the estate of Mrs. *Catherine Cumming*, who had been found a lunatic, but on whose petition an order had been made, giving her liberty to traverse the inquisition. The material facts of the case to that time will be found in the report of the case, *ante*, Vol. I., p. 537.

The lunatic having died, a creditor's suit was instituted against her administratrix for the administration of her estate, in which suit the common decree was made by Vice-Chancellor *Stuart*. Under the decree, Mr. *Ince*, the husband of the administratrix, tendered a proof for the costs incurred in the lunacy which had been paid to Mr. *Turner*, the solicitor of Mrs. *Hooper* and Mrs. *Ince*, the two daughters of Mrs. *Cumming*, who petitioned for the commission. Mr. *Turner* himself also tendered a proof for the residue of his bills of costs. The Vice-Chancellor declined to admit the proof until application had been made to the Lords Justices under the reservation

tion in the order in the lunacy. See *ante*, Vol. I., p. 561.

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Mr. *W. M. James* and Mr. *W. Morris*, for the Petitioners, referred to *Williams v. Wentworth* (a); *Wentworth v. Tubb* (b); *Chester v. Rolfe* (c).

Mr. *Burdon*, for the Petitioners for the commission.

Mr. *J. Baily* and Mr. *Southgate*, for creditors.

In this case Mrs. *Cumming* denied her lunacy to the day of her death, and there is no precedent of costs having been given under such circumstances out of the estate. If ever such a debt could be allowed as against the next of kin, it cannot as against creditors, with respect to whom such a claim is at the utmost on the same footing as a voluntary bond.

They cited *Ex parte Loveday* (d).

*The LORD JUSTICE KNIGHT BRUCE.*

Whatever may be the result of the scientific evidence, which is conflicting, Mrs. *Cumming* died, declaring herself not to be a lunatic; and a gentleman of deserved eminence, to whose opinion on matters of this description great respect and attention are due, Dr. *Winslow*, never receded from his opinion that Mrs. *Cumming* was sane. When the question as to Mrs. *Cumming* being allowed to traverse came before the full Court of Appeal, Lord *St. Leonards* himself conversed with Mrs. *Cumming*, and the consequence was, that she was allowed by the

(a) 5 *Beav.* 325.

(b) 1 *Y. & C. C. C.* 171.

(c) 4 *De G. Mac. & G.* 798.

(d) 1 *De G. Mac. & G.* 275.

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the Court to traverse the inquisition. The question then before the Court was, whether Mrs. *Cumming* was in a condition to exercise volition as to the traverse, not whether the traverse was for her benefit: the former point was decided in the affirmative; the latter, I believe, the full Court would have unanimously decided in the negative. From my recollection of the facts of the case, from the condition of Mrs. *Cumming*, her acts, and her association with the persons who surrounded her, it appeared to me clear that there never was a lady who more needed protection, and that the commission was for her benefit. She required protection of some kind, although it may not have been proper to have taken her to a lunatic asylum, or that more than a very limited, restricted and guarded interference should have taken place. If, on the application for the traverse, the issue had been, whether the commission was or was not for the benefit of Mrs. *Cumming*, I think that the full Court would have answered in the affirmative. I think that the costs and expenses, to a proper amount, were incurred for the benefit of the lunatic; and that there are both reason and authority for declaring that they were so.

*The LORD JUSTICE TURNER.*

I am of the same opinion. The order must be for taxation; and the Plaintiff's solicitor in the creditor's suit should be allowed to attend.

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In the Matter of WHARTON, a Lunatic.

**T**HIS was a petition for payment out of Court of a sum, forming part of the proceeds of land of a lunatic, sold under the 9 Geo. 4, c. 78, s. 2, re-enacted by 11 Geo. 4 & 1 Will. 4, c. 65, which provides, sect. 29, "That on any sale, mortgage, charge, incumbrance, or other disposition which shall be made in pursuance of this act, the person whose estate shall be sold, mortgaged, charged, incumbered or otherwise disposed of, and his or her heirs, next of kin, devisees, legatees, executors, administrators and assigns, shall have such and the like interest in the surplus, which shall remain after answering the purposes aforesaid, of the money raised by such sale, mortgage, charge, incumbrance or other disposition, as he, she or they would have had in the estate by the sale, mortgage, charge, incumbrance or other disposition, of which such monies shall be raised, if no such sale, mortgage, charge, incumbrance or other disposition had been made; and such money shall be of the same nature and character as the estate so sold, mortgaged, charged, incumbered or disposed of; and it shall be lawful for the said Lord Chancellor, intrusted as aforesaid, to make such orders, and to direct such acts and deeds to be done and executed, as shall be necessary for carrying the aforesaid objects into effect, and for the due application of such surplus money."

Freeholds of inheritance, the property of the lunatic, had been sold under an order made in the matter of the lunacy and of the above act. The sale was made in 1829; and in *February* 1833, 614*l.* 12*s.*, being the balance of the purchase-money after payment of a debt of the lu-

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D.M.G. natic,

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Under 11 Geo. 4 & 1 Will. 4, c. 65, authorizing monies to be raised by sales or mortgages of lunatics' estates, and providing that the lunatics' heirs, next of kin, &c., shall have the like interest in the surplus monies so raised as they would have had in the estate if it had not been so dealt with, and that such monies shall be of the same nature as the estate:—*Held*, that where a lunatic's heir had died also a lunatic, and without having elected to take such surplus monies as personalty, they were impressed with the character of realty.

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natic, was paid into Court and invested. In *September* 1841, the lunatic died intestate and unmarried. At his death his heir was a convict, undergoing a sentence of transportation in *New South Wales* for felony, and was also a lunatic. The heir died in *November* 1842, intestate, and without having been at any time capable of electing to take the surplus money as realty or personalty. The present petition was that of his heir-at-law, who was also the heir-at-law of the first mentioned lunatic.

Mr. *A. J. Lewis*, in support of the petition.

Mr. *Wickens*, for the Crown.

Mr. *Hingeston*, for another Respondent.

*Smith v. Claxton (a)* was cited.

Their LORDSHIPS held, that the surplus proceeds continued to be impressed with the character of realty, and made an order directing them to be paid to the Petitioner after payment of costs.

(a) 4 *Madd.* 484.

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1854.



In the Matter of JAMES COLQUHOUN, one, &c.

EX PARTE GEORGE FORD.

THIS was an appeal from the decision of Vice-Chancellor *Stuart*, reported in the 1st volume of Messrs. *Smale and Giffard's Reports*, Appendix, p. i. The question was, whether the Appellants (who were the assignees of a solicitor named *Colquhoun*, who had become bankrupt) were entitled, upon a petition for taxation, to charge the Respondent, Dr. *Ford*, with more than a proportionate part of the general costs due to Mr. *Colquhoun* as the solicitor for Dr. *Ford* and three other Defendants in a Chancery suit. The bill of costs as delivered by the Appellants amounted to 112*l.* 13*s.*, but the taxing master held that one-fourth part of the general costs was alone payable by Dr. *Ford*, and, applying this rule to the bill, he reduced it to 48*l.* The Vice-Chancellor affirmed this decision, having been furnished with a certificate of the taxing master (Mr. *Follett*) as to the practice. In giving judgment, his Honor said, that this state of the practice of the Court was an evil which he could not remedy, and expressed a hope that the matter would go before a higher tribunal. The assignees of the solicitor appealed.

Feb. 17, 20.

Before The  
LORDS JUSTICES.

Where several Defendants retain the same solicitor, each of them can only be charged with his proportion of the general costs of proceedings taken on behalf of all.

Where an appeal which is dismissed has been recommended by the Judge of the Court below, no costs are in general given.

Mr. *Bacon* and Mr. *Hislop Clarke* in support of the appeal.

Each of the persons employing a solicitor is liable in solido, and the assignees could have recovered at law from Dr. *Ford* the whole of the costs. This is the



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general law of the country and cannot be reversed by a rule of practice in the taxing master's office.

Mr. *Follett*, the taxing master (who, at the request of their lordships, attended in Court), stated the practice of the Court to be in conformity with the certificate with which he had furnished the Vice-Chancellor (a).

Mr.

(a) The following is a copy of the certificate:—

"*Re Colquhoun*. — To the Vice-Chancellor *Stuart*.—Sir,—In compliance with your Honor's directions I have looked into the papers relating to this taxation, and beg leave respectfully to state as follows:—1. The propriety of the taxation appears to me to depend entirely on the nature of the retainer originally given by Mr. *Ford* to Mr. *Colquhoun*, and neither in Mr. *Ford*'s petition to tax, nor in the bill itself, nor in the petition of the assignees complaining of the taxation, is there any statement whether Mr. *Ford* retained the solicitor for himself separately, or whether jointly with all or with some of the other Defendants, who were also clients of Mr. *Colquhoun*, nor are there stated any circumstances from which I am able to infer the nature of the retainer. 2. The bill appears to be taxed on the assumption that Mr. *Ford* was liable severally for his own share of the costs and nothing else, and, assuming that to be the fact, then a taxation allowing against him all that relates to himself severally, and a proportionate part of the general costs, would be in ac-

cordance with the established practice of the Court (*Harman v. Harris*, 1 *Russell*, 157; *Cradock v. Piper*, 1 *Mac. & G.* 664).

3. The practice of the Court as regards the bills of costs of several Defendants employing one solicitor, so far as regards themselves and the other parties in the suit, is free from doubt, and the taxations according to such practice are of constant occurrence. It is thus stated in Mr. Smith's Practice:—'The Plaintiffs in a suit in Chancery, however numerous, can have but one bill of costs; and the same rule applies to Defendants appearing by the same solicitor, however large their number, or however diversified their interests. Thus, if one solicitor is concerned for any number of Defendants, whatever their interests may be, he is only entitled to one bill of costs for them all, although he may in that bill charge for any separate answers which are proper for any of them, or for the employment of separate counsel at the hearing. In such cases he can, however, charge only one term fee and one attendance in Court for all of them' (5th edit. p. 580). 'The subject of apportionment of costs in re-

Mr. Glasse and Mr. T. H. Hall, for Dr. Ford were not called upon.

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lation to the matter of the suit has been already considered; there may also be an apportionment in relation to the persons who are parties. Thus, if one solicitor appears for three Defendants, and the bill is dismissed with costs as to one of them, the Plaintiff can only be compelled to pay the costs of such proceedings as exclusively relate to that Defendant, and one-third of the costs of the proceedings taken jointly for all three Defendants' (p. 580). 4. These principles are applicable to the dealings between the solicitor and his clients on his demands against them for work and labour, because the solicitor is bound, as I conceive, to make his charges against his clients and to keep his accounts with them according to the rules and practice of the Court. 5. But, nevertheless, the extent of the liability of the client may vary according to the circumstances of each case; in other words, according to the retainer of the solicitor of the Court. 6. Thus each Defendant may, on his retainer, be liable severally for his own costs only; or all or several may be liable jointly, or one may have made himself liable for his own defence, and also for that of one or more of his co-Defendants. 7. The solicitor is, however, as I conceive, bound to keep and deliver his accounts, with reference

both to this liability and to the practice of the Court. 8. If, therefore, the liability be a several, and not a joint liability, he is to charge against the client all the work he does for him severally, and his proportion of the general charges which are applicable to him and others. 9. If, however, the liability be joint, the solicitor makes out one joint bill against all the clients, and whether he sues them at law, or proceeds against them in this Court under the statute, his proceedings must, I apprehend, be against them jointly. 10. And, on the other hand, it has been decided, both in equity and at law (*Re Chilcote*, 1 *Bea.* 421; *Hobby v. Prichard*, 2 *Meeson & Welsby*, 124), that one of two persons jointly liable on a solicitor's bill cannot have an order to tax, because the solicitor is entitled to the undertaking of all to pay (although, no doubt, under special circumstances, as in case of a paid bill (*Re Stephen*, 2 *Phill.* 562), or, probably also, on the Petitioner bringing the amount into Court, taxation would be ordered). 11. After judgment on a joint bill, whether in this Court under the statute, or at law, the solicitor could undoubtedly levy his whole demand against one Defendant, but such Defendant would, in such case, be entitled to contribution over (*Edger v. Knapp*, 5 *Man. & Gr.* 753). 12. And when

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*The Lord Justice Knight Bruce.*

*Re*  
COLQUHOUN. As Mr. *Bacon* and Mr. *Clarke* say, the principle of taxation which has been acted upon in this case is open to

a solicitor sues his client for his bill at law, and the client disputes his liability to the whole or any portion of the demand, he may have the bill taxed without prejudice to his liability, and may afterwards try before the jury whether he is liable to pay the whole, or any, or what portion of the bill, the items of which have been so ascertained by the taxation; but in this Court the amount and the liability are both to be ascertained by the Master. 13. It appears to me, therefore, that the position, that the solicitor in this instance could at law have recovered his whole bill against any one of his clients, must be made with great reservations, and must depend on the circumstances of the case (whether the liability be joint or several is a question for the jury; see *Hillings v. Gregory*, 1 *Carrington & P.* 627). 14. The allegation in the petition of appeal that each Defendant is severally liable for the whole of each general fee or proceeding, so that the amount be not increased by its being taken on behalf of several persons, and not to the proportion only, does not appear to be in accordance with the practice of this Court, or with the practice of the Courts of law. If a bill against two Defendants appearing by the same solicitor be dismissed with costs against one, and with-

out costs as to the other, all the general costs are divided, though if there had been only one Defendant, the amount would have been the same (*Harmer v. Harris*, 1 *Russ.* 155); so, in an action at law, if the verdict be for one Defendant and against another (*Griffiths v. Jones*, 2 *Cr., M. & R.* 333; *Starling v. Cozens*, 2 *Cr., M. & R.* 445); so, in the common case of an attorney attending at the assizes to try two actions for two distinct clients, the expenses of his journey and attendance are equally divided, and a moiety only charged to each. And in none of these cases is it ever taken into consideration whether the remaining moiety will ever be received or not, that being considered a question entirely between the solicitor and the person liable to pay such moiety. 15. It does not appear to me that the petition presented by Mr. *Ford* for the order to tax the bill (to which I have referred), contains any admission which varies or increases his original liability, whatever that may be. He says that he, the Petitioner employed Mr. *Colquhoun* to defend him in a certain suit, wherein *A.* was Plaintiff and *B.* and others were Defendants; that the solicitor had delivered him a bill of fees and disbursements which contains many extravagant and unreasonable charges, and he

to objection, both practically and theoretically ; but I am afraid that it has taken too deep a root to be altered, otherwise than by a general order. If the question of the propriety of making such a general order should be entertained, the reasons would be fully considered on both sides. In the meantime we ought not to disturb the existing practice: by so doing we should in fact be changing the settled law of the Court.

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*The LORD JUSTICE TURNER.*

I am also of opinion that if the practice is to be altered at all it ought to be by a general order and not by decision. In considering the expediency of making such a general order many points might deserve attention which

prays for taxation, being ready and willing to pay what may be found due from him; and the order thereupon directs the taxation and an account between the parties, and that the solicitor gives credit for what he has received on account from *Ford*; but it is to be observed that if *Ford* was to pay the joint bill of himself and others, he would be entitled to credit for anything which might have been paid on account by the parties jointly liable with him. If the demand were a joint demand, this order might, I apprehend, have been discharged by Mr. *Colquhoun* for irregularity; but while it stands, it is, I think, sufficient to warrant the finding against Mr. *Ford* of whatever may be justly due from him in either view of the case, though, for the reasons above given, I do

not think it in any way varies his original liability. 16. It seems to me that it must be a question for your Honor's consideration, whether, under the circumstances of this case, the Petitioners should be allowed, if they desire it, a further opportunity of showing the circumstances of Mr. *Ford's* retainer, and of establishing against him, if they can, a liability to pay anything more than his own share of the costs; but in the absence of any evidence to that effect, the taxation appears to me to have been made in accordance with the long-established practice of the Court, from which, except on sufficient legal proof to vary the liability, I apprehend the Master has no discretion to depart.—I have, &c.—*Rob. B. Follett.*"

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which are not suggested by the discussion of a particular case.

Mr. *Glasse* asked for costs.

Mr. *Bacon*. This appeal was suggested by the Vice-Chancellor.

The LORD JUSTICE KNIGHT BRUCE.

It is not usual to give costs when the Judge, whose decision is appealed from, has recommended an appeal.



Feb. 24.

Before *The*
 LORDS JUSTICES.

The taxing master ought not to require a receipt stamp to be affixed to counsel's signature to a fee before allowing the charge on taxation.

In the Matter of BEAVAN.

A QUESTION arose on a taxation in a matter in lunacy, whether the taxing master ought to require the signature of a counsel to a fee on a brief to be written across a receipt stamp, as a condition of allowing the charge on taxation of costs. Mr. *Parkes*, the taxing master, had declined to allow payments not thus verified.

Mr. *T. C. Wright* submitted the point to their lordships, who held that the charge ought to be allowed without a stamp.



1854.

WOOD v. MIDGLEY.

THIS was an appeal from the decision of Vice-Chancellor *Stuart* overruling the demurrer of the Defendant to a bill for specific performance filed by vendors of leasehold property. The ground of the demurrer was that the bill alleged no sufficient agreement in writing within the Statute of Frauds. The substance of the material statements of the bill are set out in the report of the case below, in the second volume of Messrs. *Smale and Giffard's Reports*, page 115.

The case made by them was, that the premises were put up for sale by the directions of the Plaintiffs, subject to certain printed particulars and conditions; that the Defendant called upon the auctioneer, and went with him to the Plaintiffs' solicitor, and that the conditions of sale were then altered and turned into an agreement for sale by private contract by the direction of the Defendant, who approved of the draft so prepared, and agreed to sign it. That the auctioneer then signed the following memorandum:—

"Memorandum:—Mr. *Thomas Midgley* has paid to me the sum of 50*l.*, as a deposit, and in part payment of 1,000*l.*, for the purchase of the *Ship* and *Camel* public-house,

Feb. 28.
Before The
LORDS JUSTICES.


A defence founded on the Statute of Frauds may be taken by demurrer.

A demurrer, for that it appears on the bill that the agreement therein alleged to have been entered into, is not in writing signed by the Defendant, is not a speaking demurrer.

A memorandum that A. had paid to B. 50*l.* as a deposit in part payment of 1,000*l.* for the purchase of a house, the terms to be expressed in an agreement to be signed as soon as prepared—*held*, not a sufficient

agreement in writing.

An allegation that the Defendant had approved of a draft agreement, but had asked that, in order to save him the trouble of waiting till it was copied, he might be allowed to call and sign the fair copy in the morning, which he promised but failed to do:—*Held*, not a sufficient allegation of fraud to preclude him from setting up the Statute of Frauds as a defence.

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house, at *Dockhead*; the terms to be expressed in an agreement to be signed as soon as prepared.

" 5th of July, 1853."

" *William Lovejoy.*"

The bill alleged that the above-mentioned draft was the agreement referred to in the memorandum. It also stated, that the Defendant's solicitors, by letter to the auctioneers, stated that the Defendant declined to enter into the agreement, and demanded back the deposit.

The demurrer was as follows:—"The Defendant demurs in law to the said bill, and for cause of demurrer shows, that it appears by the bill that neither the agreement which is alleged by the bill, and of which the bill prays the specific performance, nor any memorandum or note thereof, was ever signed by this Defendant, or any person thereunto by the Defendant lawfully authorized within the meaning of the Statute of Frauds."

Mr. *Malins* and Mr. *Cairns*, in support of the demurrer, cited *Buckmaster v. Harrup* (a); *Clinan v. Cooke* (b).

Mr. *W. D. Lewis*, for the Plaintiffs.

First, this is a speaking demurrer, for it contains an allegation that there was no written agreement. Next, the want of a written agreement does not make the agreement void, and therefore a written agreement need not be alleged; *Leroux v. Brown* (c); *Dawson v. Ellis* (d). There are many cases in which an unwritten agreement as to the sale of lands will be enforced. Hence it has been held that the Statute of Frauds must be pleaded, with an averment that there was no written agreement; *Mussell v. Cooke* (e); *Mitford on Pleading* (f); *Spurrier v. Fitzgerald*;

(a) 7 *Ves.* 341.

(b) 1 *Sch. & Lef.* 22.

(c) 12 *Com. B.* 801.

(d) 1 *J. & W.* 524.

(e) *Prec. in Ch.* 533.

(f) Page 210 (3rd edit.)

v. Fitzgerald (a); *Whitechurch v. Bevis* (b); *Field v. Hutchinson* (c).

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MIDGLEY.

The merits may be classed under three heads:—First, the case comes within the authorities deciding that when a Defendant so acts as to prevent the Plaintiff from obtaining his signature, and yet to obtain from the Plaintiff a contract binding on him, a fraud is committed on the statute of which the Defendant cannot avail himself. Secondly, there is a sufficient agreement in writing, for the signature of the auctioneer bound the Defendant, and the reference to a complete document by that agreement is sufficient to incorporate the two together. Thirdly, the letter declining to enter into the agreement is a sufficient acknowledgment in writing.

He also cited *Hammersley v. De Biel* (d); *Walker v. Walker* (e); *Fowle v. Freeman* (f); *Gibbins v. Board of Management of the North-Western Metropolitan Asylum District* (g); *Maxwell v. Mountacute* (h); *Western v. Russell* (i); *Sugden, Vend. & Purch.* (k).

The LORD JUSTICE TURNER.

The Vice-Chancellor in his judgment says, that this is a case on which different minds may arrive at different conclusions, and it is one on which my conclusion differs from his Honor's.

The case came before the Court on a demurrer, and three points have been raised in argument on the part of the

(a) 6 *Ves.* 548.

(b) 2 *Bro. C. C.* 559.

(c) 1 *Beav.* 599.

(d) 12 *Cl. & Fin.* 45.

(e) 2 *Atk.* 98.

(f) 9 *Ves.* 351.

(g) 11 *Beav.* 1.

(h) *Prec. in Ch.* 526.

(i) 3 *Ves. & B.* 187.

(k) Page 199 (11th edit.)

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the Plaintiffs: first, it is said, that this is a speaking demurrer; secondly, that the nature of the case precludes a defence by way of demurrer; thirdly, on the merits, that there is an agreement in writing signed by the party sought to be charged.

Upon the first point the office of a demurrer is simply to state, that the Plaintiff has not made a sufficient case to entitle him to relief in equity. It is no part of its province to bring forward any issue of fact. If, therefore, this demurrer contains any allegation of fact, it is open to the objection made to it by Mr. *Lewis*. The allegation in the demurrer, however, is not one of a fact, but that it appears by the bill that a certain state of circumstances exists. This demurrer, therefore, raises no issue of fact, it merely states what appears by the bill, and is clearly, therefore, not a speaking demurrer.

As to the second point, it is said, that a defence founded on the Statute of Frauds cannot be taken by way of demurrer, because the statute does not destroy a parol contract, but only prevents the enforcement of a contract, unless it is evidenced by an agreement signed by the party to be charged; and a distinction was attempted to be drawn on this ground between the Statute of Frauds and the Statute of Limitations. But I cannot see any distinction between them for this purpose, because the Statute of Limitations does not destroy a debt any more than the Statute of Frauds destroys a contract. On the same principle it must rest on the Plaintiff to allege a state of facts, in each case, taking it out of the operation of the statute. Both cases depend on the same principle, which is, that it is incumbent on the Plaintiff to state facts entitling him to equitable relief. In *Foster v. Hodgson (a)*, Lord *Eldon* said, "I was present, and, I believe,

(a) 19 *Ves.* 180, 184.

believe, counsel in the cause of *Beckford v. Close*; and, I am sure, that Lord *Kenyon*, upon the doctrine he then held, thought that advantage might be taken of a case of this sort by demurrer; asking, if a Plaintiff states upon his bill a case, on which the Defendant may insist that the remedy shall be taken away, why may he not do so by demurrer?" It seems to me, therefore, that a defence resting on the Statute of Frauds may be made by demurrer.

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Upon the merits the argument is threefold. First, it is said, that the Defendant has so acted as to avoid signing the agreement, holding the other party bound by the agreement, and *Maxwell v. Mountacute* (a) is referred to on this head. But the principle of that and similar cases is fraud. If a party has been guilty of fraud, beyond all doubt the Court will not let him take advantage of the Statute of Frauds. All the cases referred to, including *Hammersley v. De Biel* (b), *Walker v. Walker* (c), and *Muckleston v. Brown* (d), rest on this principle. Is there then a case alleged by this bill of this nature, that the Defendant did by his fraudulent act prevent the agreement from being reduced to writing. I think that there is no allegation on the bill bringing forward a case of fraud. The case alleged is simply this, that there was an agreement, for a sale by the Plaintiffs to the Defendant for 1,000*l.* and the Defendant said that he would not sign any agreement. The law has said, that the Defendant is not to be sued unless upon an agreement signed by him. Is it a fraud on that law for him to say, I have agreed, but I will not sign an agreement? The next point on the merits is the contention that there is a sufficient agreement, signed by *Lovejoy*, as the Defendant's agent. The agreement is thus—[His Lordship read it.] If it had

stopped

(a) *Prec. in Ch.* 526.
(b) *12 Cl. & Fin.* 45.

(c) *2 Atk.* 98.
(d) *6 Ves.* 52.

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stopped at the word "house," perhaps it might have been sufficient, but it proceeds to provide, that the terms are to be settled, which throws the matters all loose again, and enables the Defendant to resile from the terms contained in the draft drawn up by the attorney's clerk, and to say that he will not be bound by them. The memorandum, moreover, imports a purchase of the fee simple. It seems to me to leave it quite open to the Defendant to raise a question as to what were the terms of the agreement. I agree with those cases which decide, that when the terms of a contract are concluded, and nothing remains but to reduce it into a formal shape, it may be enforced. But here, although the price was fixed, there were other points to be determined. The conditions of sale were to be adapted to a sale by private contract, and were to be subject to a future agreement.

The last argument, that the letter declining to enter into any agreement, did, in fact, constitute one, is too strained to require any observation.

The demurrer must be allowed.

The LORD JUSTICE KNIGHT BRUCE concurred.



1854.

LORD v. COLVIN.

THIS was an appeal from the decision of Vice-Chancellor *Kindersley* refusing a motion made on behalf of the Plaintiff, so far as it sought the production of certain documents which had been handed, on behalf of the Defendant, to a witness examined on the part of the Defendant, before a special Examiner.

Feb. 24.

Before *The*
LORDS JUSTICES.

On the examination of witnesses orally, under the 15 & 16 *Vict.* c. 86, the mere circumstance of a document being put into a witness's hands by the party examining him in chief, for the purpose of verifying the handwriting, does not entitle the other side to inspect the document.

The documents in question, on the appeal, were nine letters and two deeds. They had been put into the hands of the witness by the counsel for the Defendant, and the witness was merely examined as to the handwriting. The counsel for the Plaintiff then required to inspect these letters and deeds, but the Examiner, on this being objected to by the counsel for the Defendant, decided that the Plaintiff was not entitled to an inspection. The Vice-Chancellor *Kindersley* agreed with this view, and refused the motion. The case is reported below, in the second volume of *Mr. Drewry's Reports*, page 205.

Mr. Anderson, *Mr. Rose* and *Mr. G. W. Collins*, for the Plaintiff, in support of the appeal.

The counsel of the party against whom a document is tendered in evidence must be entitled to see it, to guide him in his cross-examination, which may be used in case the document should be tendered in evidence. He might call upon the witness to read the document, and if so, he must be entitled to see it. At common law the witness might be cross-examined upon a document which he simply verifies, and the object of the new Procedure Act

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Act is to assimilate the practice in equity to that at common law.—[*The LORD JUSTICE KNIGHT BRUCE.* The rule has, I believe, been, that a man may prove the execution of a document, or verify handwriting without rendering necessary the production of it in evidence. The present argument seeks to render that impossible. Does the act show an intention to alter the practice in that respect?—We submit that it does, by providing that the practice shall be like that adopted at common law in the case of a witness going abroad.

They referred to *Turner v. Burleigh* (a); *Sinclair v. Stevenson* (b); *Rex v. Ramsden* (c); *Russell v. Rider* (d); *Holland v. Reeves* (e); *Reg. v. Duncombe* (f); *Collier v. Nokes* (g), and to the 28th and 31st sections of the 15 & 16 Vict. c. 86.

Mr. Glasse and Mr. Welford for the Respondents.

The LORD JUSTICE KNIGHT BRUCE.

The only point before us at present, the sole point we are now about to dispose of, is as to the right of the Plaintiff now to require inspection or production of eleven documents, of which the handwriting or the execution was proved by a witness examined on the part of one of the Defendants. They are documents as to which not a question was asked on the part of the Defendant, whose witness he was, except such questions as merely led to the proof of execution or handwriting. Now if these documents, or any of them, were in the possession or power of the Defendant himself, the 18th section

(a) 17 Ves. 354.

(b) 1 Car. & P. 583.

(c) 2 Car. & P. 604.

(d) 6 Car. & P. 416.

(e) 7 Car. & P. 36.

(f) 8 Car. & P. 369.

(g) 2 Car. & K. 1012.

section of the act would prevent any possibility of injustice in the suit with regard to them. I examined that section when it was uncertain,—as it was for some time,—whether some of these documents were not in the possession or power of the Defendant who produced the witness. It is now stated by a solicitor of the Court—and I have no doubt accurately—that not one of them is so, but that they are all in the possession (in every sense of the expression) of the witness who did produce them.

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The documents have all been ascertained, I think, and therefore, if the Plaintiff shall wish to see them, all he has to do is to serve the witness with a subpoena duces tecum on his behalf, and the documents, if in their nature evidence, will be produced and read. Supposing, however, that not to be done, and supposing the cause taken to a hearing in its present condition, the Court, at the hearing, will have the power to prevent injustice by directing further examination or the re-examination of any witnesses.

It is not denied, that according to the established practice of the Court before the statute, this application could not succeed. But it has been said, that the 31st section of the act makes so important a change in the constitution—if I may use the expression—and the course and practice of the Court, as to render that right, which otherwise would have been wrong. Now I certainly am not prepared to say that this was the intention, or is the true construction, of the act, which says, that “the witnesses so examined orally shall be subject to cross-examination and re-examination; and such examination, cross-examination and re-examination shall be conducted, as nearly as may be, in the mode now in use in Courts of common law with respect to a witness about to go abroad,

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and not expected to be present at the trial of a cause." I do not assent to the proposition, that the true interpretation of this act renders it incumbent upon the Court, as a matter of course, to grant this application, which is not made upon any special ground. If, indeed, in the cross-examination of the witness, there had appeared reasonable ground for doubt or inquiry whether he was not mistaken as to the handwriting—whether all the documents were genuine—whether he had sufficient means of speaking to the handwriting, I can conceive that the Court would have the power to compel their production. The hands of the Court cannot be so fettered, cannot be so weak for the administration of justice in a reasonable manner, as such an argument would imply. Here the witness has not been cross-examined; the time of cross-examination, the time of bringing forward any doubt or objection, has not arrived; and we are asked without any such information, without any such guide, but as a mere matter of right, and of course, to compel the production and inspection of these documents. In my opinion, as there was no such right before the act of parliament, so there is none since.

Reserving myself, therefore, wholly upon the question what it may be proper to do on the cross-examination of the witness, if there shall be a cross-examination, or on other materials produced in any way, I decline to make the order as a matter of course, it being as a mere matter of course that we are asked to make it.

The LORD JUSTICE TURNER.

The 30th section of this act of parliament has introduced into this Court the oral examination of witnesses. And it is very observable that that section does not in any way alter the rights of parties with reference to the evidence which is to be adduced, or at all affect the mode
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of examination. The 31st section of the act applies itself to the mode in which the examination is to be taken, and it divides itself into two branches: the first branch providing by whom the examination is to be taken; the second providing the mode in which the examination shall be conducted. These provisions are modal only, and the argument upon the present motion, therefore, goes to this extent, that what is modal merely, is to be taken to alter a substantial right.

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I think the true meaning of this act of parliament is simply this: witnesses are to be examined by the examiner of the Court, or before an examiner specially appointed. The mode of examination is to be that mode in which witnesses are examined in a Court of common law, when they are about to go abroad. The provisions of the statute do not go to either of these points, viz., what questions are to be put upon the examination, or what documents are to be produced upon that examination taking place. The statute applies itself simply to the mode in which the examination is to be conducted. It could not be directed that the examination should be taken as it would be taken upon trials at law, for upon such trials the examination is not taken down in writing. It is therefore directed that the examination shall be conducted according to the mode in which it is conducted at law, when the witness is about to go abroad, in which case it is taken down in writing.

This seems to me to be an attempt—very idle and unsubstantial—to strain the language of the act of parliament, which was intended merely to alter the mode of conducting an examination, and to make it effect an alteration in substance. In my opinion this motion must be refused with costs.

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ATTORNEY-GENERAL v. THE MAYOR, ALDERMEN AND BURGESSES OF WIGAN, AND OTHERS.

Feb. 27.

Before *The*
LORDS JUSTICES.

On a motion for an injunction as to a matter merely pecuniary, the Plaintiff cannot succeed without satisfying the Court, not merely that there is a case to be tried, but that there is some probability of the bill not being dismissed at the hearing.

An information to restrain a municipal corporation from applying the borough fund or raising a rate for the purpose of opposing a bill in parliament, the object of which was to interfere with the sewage and drainage of the town:—

Held, not a suit in which success was sufficiently probable to entitle the relator to an interlocutory injunction.

Quære, whether the enrolment of an order, refusing with costs a motion for injunction, precludes the renewal of the motion before the Court of Appeal.

THIS was the renewal of a motion which had been refused by Vice-Chancellor *Wood*, seeking to restrain by injunction the Defendants from paying out of monies then, or at any time, constituting the borough fund, or out of any borough rates, a bill of costs, incurred in opposing a bill in parliament, and from making or levying any borough rate for the purpose of such payment.


The facts are fully stated in Mr. *Kay's* Reports, page 268.

The Defendants had enrolled the order of the Vice-Chancellor, and a preliminary objection was taken by them on this ground, but it was arranged that the whole case should be discussed and disposed of together.

Mr. *W. M. James* and Mr. *J. V. Prior*, for the motion.

The refusal of a motion is not like a decree, and the enrolment of such an order cannot prevent the motion from being renewed. As to the merits, although it may be conceded that the corporation are in a position analogous to that of a trustee, and may raise expenses incurred

curred in taking necessary steps for the protection of the trust property, this liberty would not be extended so as to entitle them to take such steps from an apprehension of a remote possibility of injury. In *Bright v. North* (a), the banks of the river were the special objects of the trust, but municipal corporations have no general power of applying the corporate funds to any purpose which they may conceive to be for the benefit of the inhabitants of the town. The purposes for which municipal corporations exist are defined by the 92nd section of the Municipal Corporation Act (b). They do not include any such purpose as that of preserving the sewage and drainage of towns.

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Mr. *Rolt* and Mr. *Cairns*, for the Respondents, were not called upon.

The LORD JUSTICE KNIGHT BRUCE.

Upon the question raised by the Respondents' counsel, whether the enrolment of the Vice-Chancellor's order does not preclude this motion, it appears to me not necessary to express any opinion, seeing that if they are wrong as to that point, they are otherwise, in my judgment, on the present occasion, right. I say "on the present occasion," as it is not my intention to say or do anything now that will, or that may, prejudice or assist either party at the hearing, if there shall be a hearing of the cause.

Concerning the proper decree then to be made I wholly reserve myself; but the motion, being an interlocutory application for an injunction as to a matter merely pecuniary, the Appellant cannot succeed in it without satisfying the Court that there is some probability that

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(a) 2 *Phil.* 216.

(b) 5 & 6 *Will.* 4, c. 76.

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were the cause in hearing the information would not be wholly dismissed.

I am not satisfied that there is any probability of this. On the contrary, my impression is, that the Appellant's construction of the Municipal Corporation Act is erroneous, as being too narrow; and if, according to the letter (which I neither assert nor deny), yet not according to the spirit of that statute. The costs in question were incurred by measures which (in effect merely defensive) were taken by the Corporation of *Wigan*, not unsuccessfully nor uselessly, for the purpose of preventing or diminishing the mischief, to the town of *Wigan*, that certain intended proceedings, (reasonably considered as likely to interfere materially with its drainage, and so to render the air less pure, and cause general inconvenience there,) were, not without probable grounds, thought likely to occasion,—mischief which (not solely of a public nature) might well have been expected to be also prejudicial to property belonging to the Corporation.

Supposing the Appellant's interpretation however to be correct, I apprehend that Law, as distinguished from Equity, is not powerless in the matter; but I do not found myself upon any jurisdiction existing in the Court of Queen's Bench, or in any other Court than this, when I say that, in my opinion, the present motion ought to be refused.

It would be superfluous to intimate what course I should have thought right had there been a case, or probable case, of collusion, fraud or unfair intention; for there is none. The Corporation, if they have been wrong, which I do not at present think, seem to have been honestly wrong; nor do I give any opinion whether
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the solicitors or the Corporation could, or could not, have demurred successfully to the information.

The relator must pay the costs.

The LORD JUSTICE TURNER.

The Municipal Corporation Act contains no express provision authorizing the application of the funds of Corporations to the payment of expenses incidental to the protection of the corporate property. That has been left to the general law, which sanctions such expenditure, if reasonably and properly incurred. The expenditure here in question was, as it seems to me, incurred bonâ fide for the protection of the corporate property, and my present impression is, that it was reasonably and properly incurred. At all events I cannot concur in granting an injunction, which assumes that it was not. The motion must be refused with costs.

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JACOBS v. RICHARDS.


THIS was an appeal from a decree for foreclosure made by the Master of the Rolls upon a claim. The case is reported below in the 18th volume of Mr. Beavan's Reports, page 300, where the facts are stated. They were shortly as follows:—

The mortgage was executed in 1848.

In 1852 a commission of lunacy issued against the mortgagor, who was found, upon inquisition, to have been lunatic from 1825.

witnesses, but set up, by affidavit, the insanity of the alleged mortgagor at the time of the alleged mortgage:—*Held*, that without instituting a suit of his own to set aside the mortgage, he might have its validity tried by an issue or an ejectment.

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Where a common foreclosure claim was supported by affidavits of the attesting witnesses to the mortgage deed, and the Defendant, who was the heir at law of the alleged mortgagor, did not cross-examine the

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In 1853 the present suit was instituted by the mortgagee against the co-heirs of the mortgagor, who had died intestate, by a common foreclosure claim, supported by affidavits of the witnesses, who attested the execution of the mortgage deed.

The Defendants did not cross-examine the Plaintiff's witnesses, but filed affidavits to prove insanity on the part of the mortgagor at the date of the alleged mortgage.

The Master of the Rolls held, that in order to be relieved from the mortgage, the Defendants must institute some proceeding of their own, and his Honor made the usual decree, but directed that it should not be drawn up for six months, to allow time for the Defendants, the co-heirs, to take proceedings to set aside the deed. The co-heirs appealed.

Mr. *Roundell Palmer* and Mr. *Kinglake*, for the Plaintiff (the Respondent), referred to and commented upon *Thompson v. Leach* (a); *Clerk v. Clerk* (b); *Yates v. Boen* (c); *Attorney-General v. Parnther* (d); *Snook v. Watts* (e); *Grindley v. Davis* (f); *Sergeson v. Sealey* (g); *Frank v. Mainwaring* (h); *Hall v. Warren* (i); *Ridler v. Ridler* (k); *Molton v. Camroux* (l); *Price v. Berrington* (m).

Mr. *Roupell*, Mr. *Toller*, Mr. *Karslake*, and Mr. *Coleridge*, were for the Defendants.

Their

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| (a) 3 <i>Mod.</i> 296. | (g) 2 <i>Atk.</i> 412. |
| (b) 2 <i>Vern.</i> 412. | (h) 2 <i>Beav.</i> 115. |
| (c) 2 <i>Str.</i> 1104. | (i) 9 <i>Ves.</i> 605. |
| (d) 3 <i>B. C. C.</i> 441. | (k) 2 <i>Eq. Ca. Ab.</i> 279. |
| (e) 11 <i>Beav.</i> 105. | (l) 2 <i>Exch.</i> 487. |
| (f) <i>Shelford on Lunacy</i> , 266. | (m) 3 <i>Mac. & Gor.</i> 486. |

Their LORDSHIPS held that the Defendants were entitled to have the question tried by a jury before a decree could be made against them, and offered the Plaintiff the alternative of an issue or an action of ejectment.

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The Plaintiff elected the latter.

ALEXANDER v. SIMMS.

THIS was an appeal from the decision of the Master of the Rolls, reported in the 18th volume of Mr. *Bevan's Reports*, page 80.

March 2, 5.
Before The
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The facts were shortly these:—

The Plaintiff, Mr. *Alexander*, was the owner of 8-64th parts of the ship *Norman*, and the Defendant, *Simms*, of the remaining 56-64th parts. In *October* 1850, *Simms* mortgaged his 56-64ths to *Taylor* (another Defendant), but remained in possession; and afterwards, in *August* 1851, engaged with the Plaintiff in an adventure for the purchase of guano in *Patagonia*, at their joint risk. The ship, laden with the guano, reached the *Albert Dock, Liverpool*, on the 10th of *July* 1852, whereupon the mortgagee gave notice to the Dock Company not to part with the cargo. Similar notices were given by the Plaintiff and *Simms*.

A part owner of a ship, whose share was subject to a mortgage, agreed with the other part owner (whose share was not subject to any mortgage), but without the concurrence of the mortgagee, to purchase guano on the joint account of the two part owners, and bring it in the ship to *England*. On the completion of the voyage, and when the cargo was about to be discharged, the mortgagee

The bill was filed by *Alexander* against *Simms*, a Defendant named *Ernest* who claimed under him, the mortgagee,

took possession:—*Held*, that he had no claim against the owner of the unmortgaged share for freight, and could, at the utmost, only claim to adopt the mortgagor's contract, and to stand in his place as to the profits of the adventure, after deducting all expenses.

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gagee, the captain (who claimed a lien on the cargo), and the Dock Company. The prayer was that the guano might be sold, and that the residue of the proceeds, after paying the expenses of the voyage, might be divided between the Plaintiff and Mr. *Ernest*, as the assignee of Mr. *Simms*, in the proportions to their respective shares in the vessel; or, in the alternative, that if the Court should be of opinion that the Plaintiff was not entitled to a share of the cargo, but only to a share of freight, then that the amount of freight might be ascertained, the expenses of the voyage paid thereout, and the residue divided between the Plaintiff, Mr. *Ernest*, and Mr. *Taylor*, according to their respective interests in the ship.

The Master of the Rolls held, that the proceeds of the cargo ought to be first applied in payment of the expenses of the outfit of the ship, for the purpose of her voyage to *Patagonia* and back, and of her voyage, and directed an account to be taken of what was due, and to whom in respect of such outfit and voyage, and declared that subject thereto the Plaintiff was entitled to one-eighth of the nett proceeds of the cargo, and that Mr. *Taylor*, as mortgagee, was entitled to seven-eighths.

From this decision the mortgagee appealed.

Mr. *Roupell*, Mr. *Wilde*, and Mr. *Bevir*, for the Appellant.

The 7-8th shares belonged to the mortgagee, and the mortgagor had no power to enter into a contract respecting them, which would affect the mortgagee. The mortgagee took possession before the delivery of the goods, and therefore before the transit could be considered as completed; *Hyde v. Trent and Mersey Navigation Company* (a); *Gatliffe v. Bourne* (b). The Plaintiff's cargo had been carried in a ship which, as to
 7-8ths,

(a) 5 T. R. 389.

(b) 4 Bing. N. C. 314.

7-8ths, was the mortgagee's ship, and the mortgagee, having taken possession before the delivery of the cargo, was entitled to his proportion of a reasonable freight for the use of the ship. For the freight is incident to the property in the ship, independently of express contract; *Morrison v. Parsons* (a). As there was no contract here to control or affect the mortgagee's right to freight, the amount which he was entitled to receive in respect of it could not be subject to be diminished by reason of any expenses or losses incurred in an adventure in which he had never engaged. He was entitled to be paid for the use of his shares of the ship irrespectively of any such expenses or losses. The moment a mortgagee takes possession of a ship he may do what he pleases with her. The Plaintiff had no title as against the mortgagee to have the vessel employed in discharging the cargo. [The LORD JUSTICE TURNER. Is there any title to freight in the absence of contract?]

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The law raises an implied assumpsit. Thus an underwriter, who takes an abandoned ship and brings the cargo ashore, is entitled to the whole freight, although no contract has been entered into with him. He is entitled to it, not by express contract, but by reason of his property in the ship upon the abandonment; *Case v. Davidson* (b). There Lord *Ellenborough* said, "The underwriter, indeed, does not become privy, by virtue of such abandonment, to any existing charter-party, nor perhaps to any contract of affreightment before made with the owner; but I think that by the abandonment he acquires possession of the thing from the use of which freight is to be earned." Another instance is the case of a capture, where the captor is entitled to freight, although, of course, not by virtue of any express contract;

(a) 2 *Taunt.* 407.

(b) 5 *Mau. & Sel.* 79—82.

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contract; *Case of the Fortuna* (a); *Case of the Vrow Anna Catharina* (b); *Luke v. Lyde* (c). A proportion of the freight belongs to the part owner, independently of express contract. In *Curling v. Long* (d), Chief Justice *Eyre* says, "By the marine law, indeed, parties may recover *pro ratâ*, if the voyage be interrupted. And by the common law, where a contract cannot be performed, such a meritorious consideration may arise as will sometimes entitle a party to recover, in the form of an action of assumpsit, for work and labour, even after the contract has been broken. Such is the case where a ship, after capture and recapture, completes her voyage; for there the shipper has his goods with the advantage of carriage, and upon that, though the original contract be gone, a meritorious consideration arises which entitles the master to a recompence; not, however, on the foot of the old contract, but on a new contract which springs out of it." And Mr. Justice *Heath* says, in the same case:—"This is a demand for a proportion of freight. The contract for freight is technical in its nature. By the marine law an inchoate right to freight attaches from the ship's breaking ground, and is consummated upon her arrival at the port of destination. If the voyage be interrupted the party may claim *pro ratâ*." In *Dougal v. Kemble* (e), following *Cock v. Taylor* (f), it was held, that although there may be no original contract for payment of freight, the taking of the goods is evidence of an agreement to pay freight, so that the right to freight arises from the transport of the goods and the acceptance of them by the owner, who thereby agrees to pay for their transport. Why does this not apply to the case of a mortgagee? He might have obtained a reward for the

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(a) 4 *Rob. Adm. Rep.* 278.

(b) 6 *Rob.* 269.

(c) 2 *Burr.* 882.

(d) 1 *Bos. & Pul.* 634—637.

(e) 3 *Bing.* 383.

(f) 13 *East*, 399.

use of his ship by employing it on another service. With respect to the apportionment between the mortgagor and mortgagee, the benefit of freight is entire and belongs to the owner, who is in possession when it is payable, just as in the case of a mortgagee of land, who, on taking possession, is entitled to the crops though sown by the mortgagor or his tenant: so as to a distress; *Trent v. Hunt* (a). The present case is simply this:—There are two part owners of a vessel, one of them, who has one-eighth part only, without the concurrence of the other, uses the ship: must he not pay for the use of the shares which do not belong to him? Suppose the other did not choose to complete the voyage, what was there to oblige him to do so? Was he not in the position of the underwriter in *Case v. Davidson*? Might he not have thrown the cargo into the sea and sailed away with the vessel?

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They also referred to and commented upon *Cato v. Irving* (b); *Green v. Briggs* (c); *Gibson v. Ingo* (d); *Ludgett v. Williams* (e); *Kerswill v. Bishop* (f); *Helme v. Smith* (g); *Keech v. Hall* (h); and *Ex parte Temple* (i).

Mr. Rolt and Mr. J. V. Prior, for the Plaintiff.

The argument on the other side is that, inasmuch as the mortgagor might have let the ship, the mortgagee may recover from him the freight which, if it had been let, it might have earned. Is not this the same thing as a mortgagee of land suing the mortgagor for occupation rent? The Appellant says that the freight became due
on

(a) 9 *Esch.* 14.

(b) 5 *De G. & Sm.* 210.

(c) 6 *Hare*, 395.

(d) 6 *Hare*, 112.

(e) 4 *Hare*, 456.

(f) 2 *Cro. & Jer.* 529.

(g) 7 *Bing.* 709.

(h) *Dougl.* 21, and 1 *Smith's Leading Ca.*, p. 293.

(i) 1 *Glyn & J.* 216.

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on the delivery of the cargo. But here there was no delivery. The cargo belonged to the owners of the ship. The voyage was completed by the return of the vessel before the mortgagee could possibly be said to have taken possession. *Green v. Briggs (a)*, and *Cato v. Irving (b)*, are conclusive authorities on the question.

Mr. *Bacon* and Mr. *Rogers* were for Mr. *Ernest*.

Mr. *Follett* and Mr. *Gill*, for the captain.

Mr. *Roupell*, in reply.

The LORD JUSTICE KNIGHT BRUCE.

Without at all complaining of the length to which the argument in this case has proceeded, I may still be allowed to express my surprise that it has been found possible to say so much. The question divides itself into two branches—one more important however than the other. One is between the Appellant and the Plaintiff; and the other between the Appellant and his co-Defendants. On the latter I am not so clear as on the former; but it is comparatively immaterial; and if it can be shown that the decree can be improved as to it, I shall not object to concur in some alteration, as no doubt we have the power of altering it. I am not, however, satisfied that any alteration is required.

The main question is as to the rights of the Plaintiff, and arises thus:—*Alexander* and *Simms* were owners of the vessel in question. They were in possession, *Alexander* being entitled to one-eighth, and *Simms* to the remaining seven-eighths, and *Simms* then mortgaged his share for valuable consideration, in a regular and
 effectual

(a) 6 *Hare*, 395.

(b) 5 *De G. & Sm.* 210.

effectual manner, to the Appellant, who did not enter into possession. *Alexander* and *Simms*, being in possession, resolved to employ the vessel thus: to send it to *South America* to obtain a cargo of guano on a joint adventure in the same shares between themselves, as those in which they were interested in the ship. The vessel was fitted out, and a considerable expense incurred; guano was obtained at some expense; the vessel came back, also at some expense, and reached the furthest point of her voyage, the port of discharge, so that nothing remained to be done, but the removal of the cargo on shore by lighters, or otherwise. The vessel being in this condition at the termination of the voyage, the mortgagee took possession, and the question is, what was the effect of that step? I desire not to be understood as giving an opinion as to the consequence, if possession had been taken by the mortgagee before the completion of the voyage;—for instance, if the mortgagee had caused the cargo to be disposed of, or brought home, after having been in possession during the performance of a substantial part of the voyage. That question does not arise here. In the circumstances of the present case, the mortgagee claims to retain *Simms'* share until something, which he calls freight, shall have been paid; meaning, I suppose, a sum equal to that which would have been earned if the guano had been shipped by a stranger under a contract to pay *quantum meruit*. This the mortgagee calls freight, and he claims to retain seven-eighths of the amount. His claim is opposed by the Plaintiff, the other part owner, who says that the voyage was a partnership adventure with respect to the goods, and that whatever the rights of the mortgagee may be against the mortgagor, the Plaintiff has no concern with them. I apprehend that this was the state of the contending parties. Freight there was none. There was no contract for freight. There was no bargain to pay

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pay anything for the transit of the goods. The contract, express or implied, under which the guano was obtained, was, that all the expenses of the adventure should, in the first place, be paid, and that what remained of the goods or their proceeds, should be divided in the proportion of seven-eighths to one-eighth. What right can the mortgagee have to change that contract? When a voyage has been performed, and the ship has arrived at its port of destination, and the mortgagee takes possession, he may be, and probably is, entitled to the benefit of any contract with his mortgagor under which the goods were shipped and conveyed, but he is entitled to no more. He cannot make a new contract. It may be, that if he had intercepted the voyage, he might have sent the vessel elsewhere. But when, the voyage being terminated, possession is taken by the mortgagee, he can claim no more than the benefit of the contract, and the contract was such as I have mentioned. It is of course a matter of indifference to the Plaintiff what becomes of the seven-eighths to which he is not entitled, whether they are to be paid to *Taylor* or any one else. This appeal having arisen upon a ground, as to which I think the Appellant clearly wrong on authority, reason, convenience and justice, he must pay the costs, reserving, however, to him leave to apply for an alteration of the decree, if he shall be so advised, as between himself and his co-Defendants.

The LORD JUSTICE TURNER.

This case has been very ably argued on behalf of the mortgagee, and during the progress of the hearing I have felt embarrassed by some of the arguments adduced. Many cases were properly put by way of illustration, on which it is not necessary to give any opinion. The decree decides, first, that the expenses of the voyage are
the

the first charge on the cargo ; and, secondly, that seven-eighths of the cargo belonged to the assignee of *Simms*.

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As to the first point, the true question is, what is the interest of a mortgagee of a ship? I think that by the mortgage he has a lien on the share of the ship and a proportionate part of the earnings attributable to such share. But then the question is, what are the earnings? I think that there are no earnings till the expenses are paid, by means of which those earnings are acquired. When, therefore, the Appellant claims a share of the earnings discharged from all share of the expenses, he claims more than he is entitled to under his mortgage. It has been said, that a mortgagee is not bound by the contract of the mortgagor, and that is true ; but here the question is, what rights were conferred by the mortgage? If the mortgagee only takes a share of the earnings, he takes subject to the deduction which I have mentioned. An analogy was suggested to a mortgage of land, where the mortgagee is entitled to the crops. That, however, is not a case of property belonging to partners or part-owners. There the estate passes by the mortgage. No contract with a third person enters into the case. I should concur with my learned brother, even if the case were not governed by authority, but it is, in my opinion, governed by *Green v. Briggs*.

Then, as to the second point, there was no contract for freight, no charter-party, but an adventure on the joint account. What is there to distinguish this from the ordinary case of a mortgage, where the rule is, that a mortgagee is not entitled to an account of back rents against a mortgagor in possession? I am of opinion, that the decree in this case leaves open every question that need be left open between mortgagor and mortgagee, and I entirely agree that the appeal must be dismissed with costs.

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HILL v. THE GREAT NORTHERN RAILWAY COMPANY.

March 15.

Before *The*
LORDS JUSTICES.

A bill filed against a Railway Company by the grantee of an annuity charged on land taken by the Company stated, that, before the grant of the annuity, the land was subject to a mortgage in fee, which had since been paid off, but that there had been no reconveyance; that the Defendants, under the powers of their act, had given the Plaintiff notice to treat for the land charged with the annuity, but without any further proceeding had taken possession of the land.

The prayer was, that the Company might be decreed to pay the arrears of the annuity and to secure the future payment of it. The defence made by the answer and evidence was, that the Company had purchased from the prior incumbrancer under a power of sale:—*Held*, that the Plaintiff could not on such pleadings enforce a specific performance of the notice to treat regarded as a contract to purchase the Plaintiff's interest.

The prayer for general relief is not available for the purpose of obtaining a decree at variance with the case made by the statements of the bill.

THIS was an appeal from the decision of Vice-Chancellor *Kindersley*, who held, at the hearing of the cause, that the Defendants, the Great Northern Railway Company, were bound to pay off an incumbrancer, to whom they had given the usual statutory notice of their intention to take the land which was subject to the incumbrance.

The bill stated an indenture, dated the 26th of *January*, 1838, and made between *Philip Radnor* and *Esther*, his wife, of the one part, and the Plaintiff of the other part, whereby, in consideration of 100*l.*, an annuity, or yearly sum of 7*l.*, was granted to the Plaintiff for the lives of three persons therein named, charged upon and issuing and payable out of (among other leasehold premises therein mentioned) certain leasehold houses, numbered 8 and 9, *Union Place, Maiden Lane, Battle Bridge*.

That a memorial of the above indenture was duly enrolled pursuant to the act of Parliament.

That *Philip Radnor*, and *Esther*, his wife, had, previously to granting the aforesaid annuity of 7*l.* to the Plaintiff,

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The prayer was for an account of what was due for
F 2 arrears

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arrears of the annuity, and that the Company might be decreed to pay to the Plaintiff the amount which should be so found due, together with his costs of the suit, by a short day to be appointed for that purpose, and that the Company might be also decreed, by a short day to be appointed for that purpose, to pay to the Plaintiff, for the repurchase or redemption of the said annuity, the sum of 103*l.* 10*s.*, or else to pay into the Bank of *England*, in the name and with the privity of the Accountant General, in trust in the cause, such a sum as from the dividends thereof would be sufficient to pay and satisfy the annuity for the future.

At the hearing before the Vice-Chancellor, the case was argued on the assumption, that it was, in effect, a suit for specific performance, and his Honor held that, whether it was a case for specific performance or not, the Plaintiff, by reason of the service of the notice, was entitled to payment; and his Honor directed preliminary inquiries as to the value of the Plaintiff's interest.

Mr. *Elmsley* and Mr. *Younge*, for the Plaintiff, contended that the notice constituted a contract which the Court would specifically perform, and cited *Rex v. Hungerford Market Railway Company* (a); *Adams v. The London and Blackwall Railway Company* (b); *Marquis of Salisbury v. Great Northern Railway Company* (c); *Doo v. London and Croydon Railway Company* (d).

Mr. *Rolt* and Mr. *Goren*, for the Appellants.

[The LORD JUSTICE KNIGHT BRUCE asked whether the

(a) 4 B. & Ad. 327.

(b) 2 Mac. & Gor. 118.

(c) 17 Q. B. 840.

(d) 1 Rail. Ca. 257.

the argument adduced in support of the bill was consistent with the case made by it].


We submit that it is not, and that the Plaintiff, by his bill, assumes to be still owner of his charge, and seeks to enforce it.

Mr. *Elmsley*, in reply, contended that the facts all appeared on the pleadings and evidence, and that under the prayer for general relief the proper decree might be made, which was that pronounced by the Vice-Chancellor.

The LORD JUSTICE KNIGHT BRUCE.

The bill in this case, when before the Vice-Chancellor, was treated at the bar, and accordingly his Honor heard, treated and disposed of it, as if it had been a bill for specific performance of a contract express or implied, or (unless it is mere repetition to say so) a bill to compel the Railway Company to purchase land of which they had given notice to treat for the purchase. The Vice-Chancellor's decree proceeded on that view of the subject, and I desire to be understood as giving no opinion whatever as to the decree upon the hypothesis of the bill having been such as was supposed. The same view of the bill was presented to us here by the bar, and the argument had proceeded to a considerable length before that occurred to us, which perhaps might as well have occurred before, that the bill was not of the assumed description. The bill is not a bill for specific performance. It is not a bill for the performance at all of any contract, express or implied, nor a bill to compel the Railway Company to complete a purchase in any sense. It is a bill by an equitable incumbrancer on land, alleging that a former incumbrancer, whose incumbrance had deprived the Plaintiff of the legal estate, had been paid off, and that

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that a Railway Company which had at one time professed to wish to acquire the land, and had given notice to the Plaintiff, which notice the Company had not acted upon, had actually taken possession of the land.

If there had been nothing more in the matter, the Plaintiff would have had a right (subject to one point which I will presently notice) to have the impediment arising from the legal estate removed out of the way, in order to be enabled to distrain safely upon the land charged. The only difficulty would have been that the bill states distinctly that the legal estate is outstanding, and that what it alleges is consistent with the legal estate being in a person not a party to the suit. I have assumed, however, in the observations which I have made, that that difficulty is not in the Plaintiff's way, and that the bill as a bill for an ordinary equity is correct. The case, however, is met on the part of the Company by a defence of this kind, viz. that they have bought the land under a title paramount, so as wholly to destroy the Plaintiff's interest, and to leave him without a remedy on the land, and with one only against the money in the hands of those who sold it, or of personal redress against them for the sale.

The answer and evidence affording, in that way, a complete defence, are destructive of the Plaintiff's title; and if the Plaintiff had a reasonable hope of meeting that defence, the course would have been to amend the bill by charging that the sale was an improper transaction against which the Plaintiff was entitled to be relieved. This was not done, and the bill remains a mere bill by an equitable incumbrancer to have a legal impediment removed out of his way, met by an allegation and proof of paramount title, against which no objection has been proved or even suggested. Such a bill must fail; and
 I find

I find myself differing from Vice-Chancellor *Kindersley* on this subject with less surprise and less diffidence than I should otherwise have felt, because the bar on both sides stated the case and treated it before him on the principle which I have mentioned. It was treated so here during nearly the whole of the argument on the appeal, and it was only towards the end of that argument that the other view presented itself to our minds. The bill must be dismissed, but without costs.

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The LORD JUSTICE TURNER.

This bill, if maintainable at all, can be maintained only on one or other of these two grounds; either that it is a bill for specific performance of a contract to purchase the Plaintiff's interest in the land, upon which his annuity is charged, or that it is a bill complaining that the Defendants have taken away the Plaintiff's security for the payment of his annuity. With respect to the bill being for specific performance of such a contract, as I have mentioned, I observe that it deals with the annuity as a subsisting annuity. It does not treat the matter as an agreement by the Company to purchase the Plaintiff's interest in the land, but as an entry into possession of the land by the Company without title, the Company being stated to have purchased from a person whose incumbrance had been satisfied. So far therefore is the bill from treating the Plaintiff's interest as having been purchased, that it treats the annuity as a subsisting interest, to which the Company is subject by reason of their purchase of the land. That is inconsistent with a contract for the purchase of the Plaintiff's interest in the land. It is true that in cases in which Plaintiffs are not entitled to the relief specifically prayed, and the relief to which they are entitled is consistent with the facts stated in the bill, the prayer for general relief is called in aid to give the Plaintiffs the relief to which they are really entitled ;
but

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but this is never done where the case stated by the bill is inconsistent with the relief which is asked under the general prayer.

Then, considering the bill in the second point of view, viz., as complaining that the Defendants have taken away the Plaintiff's security for his annuity, the bill does not contain any allegation that the Company acquired any estate in the property. It alleges only that *Gadd's* incumbrance was satisfied, and that the Company entered on the land before the incumbrance of the Plaintiff was satisfied,—that the Company had taken possession of the houses. What equity can there be upon such an allegation? The Company set up by their answer an actual purchase of the property from *Gadd* and the bill does not ask to disturb that purchase. But if that difficulty was got over, there is yet another. The Company having purchased the property from *Gadd* must have acquired all the rights of *Gadd*, and the bill therefore ought to have sought to redeem the estate which the Company acquired from *Gadd*. I concur therefore in the opinion that this bill must be dismissed, though without costs and without prejudice to any other proceeding by bill or otherwise which the Plaintiff may be advised to take touching the matters mentioned in the bill.

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In the matter of the Estate of J. H. KEOGH, deceased,
and of 12 & 13 *Vict.* c. 77.

THIS was a motion *ex parte* for an attachment order, directing that *R. A. Mole* and *Annette Garotin* his wife, against whom two orders had been made by the Commissioners, under the Incumbered Estates (*Ireland*) Act, 12 & 13 *Vict.* c. 77, s. 14 (a), for payment of 400*l.*, might

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TICES.

An attachment may issue in this country to enforce an order for payment of money made in *Ireland* on petition under the Irish Incumbered Estates Act.

(a) Sect. 14, "Every Order made by the Commissioners under this act, a copy whereof shall be certified under their seal to the High Court of Chancery in *England*, may be enrolled in like manner and enforced by the like process as an order for payment, or for accounting for money, made by the High Court of Chancery in *Ireland*, a copy whereof is exemplified and certified to the said Court of Chancery in *England*, under the Great Seal of *Ireland*, may be enrolled and enforced under an act passed in the 41st year of the reign of King *George* the Third, intituled, 'An Act for the more speedy and effectual Recovery of Debts due to his Majesty, his Heirs and Successors, in right of the Crown of the United Kingdom of *Great Britain* and *Ireland*, and for the better Administration of Justice within the same.'" By the 41 *Geo.* 3, c. 20, s. 6, the act referred to, it is enacted, "That in all cases

where in any suit between party and party any decree shall be pronounced, or any order made for payment, or for accounting for money, by the High Court of Chancery in that part of the United Kingdom called *Ireland*, the Lord Chancellor, Lord Keeper, or Lords Commissioners for the custody of the Great Seal of *Ireland* for the time being respectively, shall, upon application made to him or them respectively, cause a copy of such order or decree to be exemplified and certified to the Court of Chancery in that part of the United Kingdom called *England*, under the Great Seal of *Ireland*; and the Lord Chancellor, Lord Keeper, or Lords Commissioners for the Great Seal of *England*, shall forthwith cause such order or decree, when it shall be presented to them respectively so exemplified, to be enrolled in the Rolls of the High Court of Chancery in *England*, and shall cause process of attachment and committal

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might pay that sum within a fortnight; or in default thereof, should stand committed.

The persons, against whom the orders had been made, had come to *England*, whereupon the orders were enrolled in the Court of Chancery in *England*, and application was made for an attachment, but a difficulty was raised in the office upon the words of the statute 41 *Geo.* 3, which refer only to "any suit between party and party," and did not appear to extend to a petition.

Mr. *Borrett* appeared in support of the Application.

Their LORDSHIPS held that, the orders might be treated for the purposes of the act as if they had been made in *Ireland*, in a suit between party and party, and that an attachment might at once issue against the husband, but not against the wife.

to issue against the person of the party against whom such order or decree shall have been made respectively, in order to enforce obedience to and performance of the same, as fully and effectually, to all intents and purposes, as if such order or decree had been originally pronounced in the said Court of Chancery in *England*."

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MANIERE v. LEICESTER.

THIS was a motion *ex parte* on behalf of the Plaintiff, that the Clerk of Records and Writs might be directed to give a certificate of the filing of the answer of one of the Defendants, and of a traversing note against the other for the purpose of enabling the Plaintiff to move for a decree.

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tices.

The filing of a traversing note against one Defendant does not preclude the Plaintiff from moving for a decree, and he is entitled to a certificate from the Clerk of Records and Writs, of the filing of the note, and of the answer of the other Defendant, to enable him to enter the cause for hearing with the Registrar.

There were two Defendants. Both had been served with interrogatories. One had put in an answer. The other had gone abroad without having answered. The Plaintiff filed a traversing note against the latter. The Plaintiff then applied to the Clerk of Records and Writs for a certificate of the filing of the answer and traversing note for the purpose of having the cause heard upon a motion for a decree; but the Clerk of Records and Writs, being of opinion that the filing of the traversing note precluded the Plaintiff from having the cause heard upon a motion for decree, declined to give the certificate. The matter was brought before the Vice-Chancellor *Wood* who suggested that it should be mentioned to their Lordships.

Mr. *Prendergast*, in support of the motion, referred to the 53rd and 57th Orders of the 8th of *May*, 1845, and to the 15th section of the 15 & 16 *Vict.* c. 86.

Their LORDSHIPS, after conferring with Mr. *Murray*, one of the clerks of Records and Writs, held that, according to the most probable and convenient interpretation of the effect of the 57th Order and the 15th section of the act, the certificate ought to issue.

1854.



STONE v. GODFREY.

March 6, 16.

Before The
LORDS JUSTICES.

A husband survived his wife, who was one of several equitable tenants in common. He was advised by counsel that he had no title as tenant by the curtesy, his wife never having been in possession, and that if he intended to set up such a title, he ought not to sue with his infant

THIS was the appeal of the Plaintiff from a decree of Vice-Chancellor *Stuart*, dismissing a bill, whereby the Plaintiff sought to be relieved against a settlement on the ground of mistake. The case is reported by Messrs. *Smale* and *Giffard*, Vol. 1, p. 590, where the facts are fully stated. The following statement will be sufficient for the present report.

John Watterer, by his will dated the 5th of *April*, 1799, devised his residuary, freehold and copyhold estates to trustees in trust to pay the profits and rents thereof as follows (that is to say): to pay unto his sister, *Sarah Algrove*, 5*l.* per year for ten years, and to pay the residue to the testator's brothers and sisters, *James, Jesse, Elizabeth*

daughter in a partition suit which was then in contemplation. The suit was nevertheless instituted by him as the next friend of the daughter, and in 1830 a decree was obtained. A partition was made under the decree, and the legal estate in the daughter's share conveyed to the use of the father during the infancy of the daughter, in trust for her maintenance, and afterwards to her own use in fee. The daughter attained twenty-one in 1843, and married in 1847. In 1852 the father filed a bill to be relieved from the trusts, on the ground of mistake, and to have his title as tenant by the curtesy established:—*Held*,

1. That length of time and acquiescence, and the marriage of the daughter, although without the father's consent, before the father disputed the daughter's title, constituted a sufficient answer to the suit.

2. That the Court has power to relieve against mistakes in law as well as against mistakes in fact; but that where relief is sought against the consequences of mistakes in law, the Court must be satisfied that the Plaintiff's conduct has been determined by those mistakes.

3. That possession obtained in the character of trustee cannot be retained as one adverse to the cestui que trust, after the legal estate under which the possession was taken has determined.

4. That the fact of the marriage having taken place on the faith of the daughter's interest being free from any estate by the curtesy, was sufficiently put in issue by statements in the answer to the effect that up to the marriage the father always told the daughter that the monies which he paid her were the balance of the rents after deducting the expenses of her maintenance, and that the land was her property, and never made any claim of right to them on his part.

Elizabeth Chitty, and *Jane Watterer*, in equal proportions, for their lives as tenants in common, and after their several deceases, then over to each and every their several issue and issues absolutely for ever; but should the said trustees thereafter think proper, and for the advantage of the said legatees, to sell the said freehold and copyhold estates, he thereby authorized them so to do and to invest the monies arising from the sale in the funds or on other good securities as to them should seem best, and the interest and product thereof, after deducting what expenses they might sustain or be put unto by means thereof, to dispose as follows: that was to say, to pay *Sarah Algrove* the said sum of 5*l.* per year for the said term of ten years should the said term be unexpired, and the rest, residue and remainder thereof to pay unto the testator's brothers and sisters, *James*, *Jesse*, *Elizabeth Chitty*, and *Jane Watterer*, by equal portions for their lives as tenants in common, and after their several deceases then over to each and every their several issues absolutely for ever.


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The testator died in *May* 1799, leaving his brothers and sisters *James Watterer* and *Jesse Watterer*, *Sarah Algrove*, *Elizabeth Chitty* and *Jane Watterer* (in his will named) him surviving.

Jesse Watterer died in *November* 1819, intestate, leaving *James Watterer* his heir at law. *James Watterer* had one child only, namely, *Mary Stone*, the late wife of the Plaintiff, to whom she was married on or about the 19th of *July* 1821. *James Watterer* died on the 6th of *March* 1822, intestate. *Mary Stone* died in 1824, leaving *Elizabeth Stone*, her only child, then an infant.

In 1826 a case was laid before the late Master *Duchworth* (then at the bar) on behalf of Mr. *Stone* and his infant

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fant daughter, with a view to the institution of a suit on behalf of the daughter for a partition. Mr. *Duckworth* wrote the following opinion:—"I am of opinion that Mr. *Stone* has no right or interest under the will of 1799. "He might have been tenant by the curtesy of his late wife's share, if she had been seised thereof; but she "was never in possession, or receipt of rent, absolutely "or constructively; for her title to the premises was "always and is still denied and treated as a nullity by "those in possession. If, however, Mr. *Stone* thinks "fit to claim the curtesy, either on the ground of the "possession of the tenants, or of the trustee being the "possession of his late wife, it is clear that such claim "will be adverse to that of his daughter, and that they "cannot sue together."

. On the 1st of *November* 1826 a bill was filed on behalf of the infant by the present Plaintiff, as her father and next friend, against the other persons entitled beneficially, and the surviving trustee of the will, praying that the will might be established and the trusts thereof performed, and for an account of the real estates of the testator which passed under his will, and of the rents and profits of such parts thereof as were devised to the trustees as aforesaid, which had accrued due since the death of *Mary Stone*, and what parts of such rents and profits had been received by the surviving trustee; that the trustee might be decreed to pay two-fourths parts or shares of such rents and profits to *Elizabeth Stone*, and that a partition might be made of all the last-mentioned premises between *Elizabeth Stone* and the Defendants.

At the hearing of that cause on the 5th of *February* 1830 a decree was made declaring that the will ought to be established and the trusts thereof performed, and the same was ordered and decreed accordingly; and it was declared

declared that *Elizabeth Stone* had been entitled from the death of her mother to two-fourth parts of the estate in fee simple and the rents and profits thereof. The decree directed accounts to be taken, and a commission of partition to issue to divide the estate into four equal parts, and that two-fourth parts of such estate should be allotted to the Plaintiff.

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The commission was executed, and the return was on the 11th of *May* 1832 confirmed absolutely.

On the 23rd of *February* 1833 *Elizabeth Stone* presented a petition in the cause to the Master of the Rolls, praying that the rents of the premises allotted to *Elizabeth Stone* on the partition, or a sufficient part thereof, might be applied in her maintenance, education and clothing during her minority or until further order. The petition came on to be heard with the cause on further directions on the 5th of *March* 1833, when it was ordered that the surviving trustee should execute proper conveyances to *Elizabeth Stone* of the two-fourth parts of the hereditaments allotted to her, and that the rents and profits should be received by the Plaintiff, and by him applied in and for the maintenance, education and clothing of *Elizabeth Stone* during her minority, or until further order.

Indentures of lease and release were in pursuance of this order prepared and approved of by the Master, dated the 30th and 31st of *October* 1833, the release being expressed to be made between the surviving trustee of the first part, the present Plaintiff of the second part, and *Elizabeth Stone* of the third part, whereby the lands allotted in severalty to *Elizabeth Stone* were conveyed and assured to the use of the present Plaintiff, his executors, administrators and assigns, for ten years, if *Elizabeth*

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beth Stone should so long live and remain an infant and unmarried, upon the trusts thereafter mentioned, and from and after the expiration or sooner determination of the said term, and in the meantime subject thereto and to the trusts thereof, to the use of the said *Elizabeth Stone*, her heirs and assigns, for ever ; and it was further declared that the present Plaintiff, his executors, administrators and assigns, should stand and be possessed of and interested in the hereditaments thereinbefore released for the term of ten years (determinable as aforesaid) upon such trusts, and to and for such ends, intents and purposes, as the Court of Chancery should from time to time order or direct, and until such order or direction should be made upon trust that the Plaintiff should receive, call in, and compel payment of the rents and profits of the hereditaments and premises when and as the same should become due and payable, and should pay and apply the same rents, issues and profits as and when the same should be received, or such part thereof as he or they should think proper for or towards the maintenance, education, clothing and support of *Elizabeth Stone*, and should accumulate the residue (if any) of the rents, issues and profits in the way of compound interest, and should stand and be possessed of such residue and the accumulations thereof in trust for *Elizabeth Stone*, her executors, administrators and assigns.

The present Plaintiff never executed the lease or release. They were executed by the surviving trustee alone.

Elizabeth Stone attained twenty-one in 1843, and in 1847 married Mr. *Godfrey*.

In 1852 her father instituted the present suit against her and her husband, stating by his bill that the Plaintiff

tiff was entitled as tenant by the curtesy and that he was ignorant of the fact and of his right in that behalf during the whole progress of the former suit and proceedings; that those proceedings were conducted and carried on under the direction of the Plaintiff as next friend of *Elizabeth Godfrey* by the then solicitors of the present Plaintiff, in entire ignorance that he had or was entitled to such estate by the curtesy, or had any rights in the premises, until after the final decree had been made in the suit and the conveyance, in order to carry the same into execution, was in course of preparation. That *Master Senior* (then at the bar) was instructed to prepare and settle the draft of the said conveyance and to investigate the title to the residuary real estate of the testator previously to the preparation and settlement of the draft; and that *Mr. Senior* first suggested that the Plaintiff was entitled to such estate by the curtesy, and drew attention thereto, in an opinion written by him on or about the 19th of *July* 1833, which, so far as related to the rights of the Plaintiff, was as follows: "I confess I do not understand the decree. It appears to me that *Mary Stone*, the mother of the Plaintiff, was the person seized in fee; and consequently that *Jabez*, the father, ought to have been considered tenant by the curtesy." That such opinion or the effect thereof was sometime afterwards communicated to the Plaintiff by his then solicitors, but that such communication was not made until after the conveyance had been made and executed by the trustee of the will. That until the Plaintiff received such communication he was entirely ignorant of the fact that he was entitled as tenant by the curtesy, or that he had any personal right or interest in the property, and that, in fact, prior to the institution of the former suit, the counsel, who advised thereon, and settled the bill, advised that the Plaintiff had no right or interest as tenant by the curtesy; that *Mr. Senior*, although he

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had given such opinion as aforesaid, afterwards concurred with the counsel who so advised; and that when or shortly after such communication was made to him, the Plaintiff entered into the receipt of the rents and profits of the lands and hereditaments which had been so allotted or awarded and conveyed in severalty in lieu of the two undivided fourth parts or shares, and had ever since remained and still was in the receipt of the rents and profits. That *Elizabeth Stone* attained twenty-one in 1843, and had since, but against the wish of the Plaintiff, married, and with her husband commenced an action of ejectment against the Plaintiff.

The prayer was, that the Plaintiff might be declared entitled to an estate by the curtesy in the hereditaments allotted to the Defendant *Elizabeth Godfrey* in severalty, and that the estate acquired by her under the aforesaid conveyance to her might be declared subject to such estate of the Plaintiff, the said conveyance having been made under a mistake; and that the Defendants might be decreed to convey the hereditaments to the Plaintiff for his life, or that he might be otherwise quieted in the possession or enjoyment thereof against the Defendants or any person claiming under them or either of them; and that if necessary, or the Court should think fit, the decree made on the 3rd of *February*, 1830, might be declared to have been erroneous, so far as it declared that the Defendant *Elizabeth Godfrey* had been entitled from the death of her mother to two fourth parts of the estates in fee simple, and the rents and profits thereof; and that the Court might, if necessary, or it should think fit, alter and vary the said decree. And that the Defendants might be restrained by injunction from further prosecuting the action of ejectment.

The Plaintiff made an affidavit to the effect of the above statement.

The

The Defendant Mr. *Godfrey* deposed, that previously to his marriage with his wife *Elizabeth Godfrey* he was well acquainted with the Plaintiff; and had frequently heard the Plaintiff speak of and describe as the property of his (the deponent's) wife a certain estate situate at *Mayford*, in the parish of *Woking*, in the county of *Surrey*. And that subsequently to the marriage the Plaintiff had also spoken of and described the *Mayford* estate as the property of his (the deponent's) wife, and had promised to account to the deponent and his wife for the rents and profits received in respect of the said estate.

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Mr. *Lee* and Mr. *Fooks* supported the appeal.

Their arguments were in substance the same as were urged by them below. They referred to *Casborne v. Scarfe* (a); *Roberts v. Dixwell* (b); *De Grey v. Richardson* (c); *Sweetapple v. Bindon* (d); *Lord Grenville v. Blyth* (e); *Morgan v. Morgan* (f); *Parker v. Carter* (g); *Co. Litt.* 29 a; *Gee v. Spencer* (h); *Bingham v. Bingham* (i); *Cocking v. Pratt* (k); *Pooley v. Ray* (l); *Evans v. Llewellyn* (m); *Turner v. Turner* (n); *Tucker v. Searle* (o); *Marquis of Townshend v. Stangroom* (p); *Fonblanque on Equity* (q); *Mitford on Pleading* (r).

Mr. *Glasse* and Mr. *F. P. Morris* for the Respondents, cited *Hearle v. Greenbank* (s); *Cholmondeley v. Clinton*

(a) 1 *Atk.* 603.

(b) 1 *Atk.* 607.

(c) 3 *Atk.* 469.

(d) 2 *Vern.* 536.

(e) 16 *Ves.* 224.

(f) 5 *Madd.* 408.

(g) 4 *Hare*, 400.

(h) 1 *Vern.* 32.

(i) 1 *Ves.* 126.

(k) 1 *Ves.* 400.

(l) 1 *P. Wms.* 355.

(m) 2 *Bro. C. C.* 150.

(n) 2 *Ch. Rep.* 81.


(o) 2 *Ch. Rep.* 91.

(p) 6 *Ves.* 328.

(q) Page 116 (5th edit.)

(r) Page 112 (5th edit.)

(s) 3 *Atk.* 695.

1854. *Clinton (a); Stewart v. Stewart (b); Smith v. Clay (c);*

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GODFREY. Mr. Lee, in reply.

March 16. *The LORD JUSTICE KNIGHT BRUCE.*

This suit, commenced in the year 1852, had and has for its sole object the establishment of the alleged title of Mr. *Jabez Stone*, the only Plaintiff, to an equitable life interest in some lands in *Surrey*, of which seemingly the annual value is between 20*l.* and 40*l.* This he claims as tenant by the curtesy, having survived his wife the mother, by him, of the Defendant Mrs. *Godfrey*, whom I collect to be his only child. The other of the two Defendants is her husband, who became so in the year 1847, when she was between twenty-four and twenty-six years of age (her birth having been in 1822). And the Defendants appear to be, in right of the lady, as tenant in fee simple or tenant in tail, entitled legally as well as equitably to the lands, either free from any other title or claim, or subject only to the demand of Mr. *Stone*, made, as I have said, in the present suit; a demand, however, which is absolutely at variance and inconsistent with a Decree of this Court, made at the Rolls in the year 1830, in a cause in which Mrs. *Godfrey* (then of course a child under nine years of age) was the Plaintiff, and *John Kemp* and others were Defendants. If Mr. *Stone* is or was tenant by the curtesy, or entitled to be so, not only was the Rolls Decree erroneous, as excluding, in Mrs. *Godfrey's* favour, that alleged right—that alleged title—but the suit itself in which the Decree was made

(a suit

(a) 4 *Bli.* 35.

(b) 6 *Cl. & F.* 911; 4 *Bli.*
 118; *Rob. & Maclean*, 416. See
 also *Dixon v. Monklands*, 5 *Wil-*

son & Shaw, 417.

(c) *Amb.* 645.

(d) 3 *Bro. C. C.* 633.

(e) 2 *Sch. & Lef.* 101.

(a suit for partition among other purposes) was defectively and wrongly constructed; for Mr. *Stone*, who was not a Plaintiff, was also not a Defendant in it; although if his alleged title exists, and is of any force or validity, it did exist and was at least of equal force and validity not only before and when the Decree was made, but before and when the bill upon which it was pronounced was filed,

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Now, it appears from what I have said that the Decree preceded, by more than twenty years, the commencement of the present suit. When was Mr. *Stone*, however, first aware of the Decree? The answer must be, that he was so as soon as it was made. He, in fact, asked and obtained it as the next friend of his daughter, which character he filled in the cause and throughout the cause during her minority. So that, if it be assumed (as upon the hypothesis of our knowing the whole truth I do assume) that, had Mr. *Stone* at any time between the majority and the marriage of his daughter, filed a bill against her for the purpose of obtaining substantially the same relief as he is now asking, and upon the same ground, he would have been entitled to succeed in his suit, I must, to say the least, represent myself as not by any means satisfied that now he is not barred by the lapse of time between the year 1830 and the year 1852; and this, whether laying or not laying stress on the order of 1833 and the conveyance of the same year, two documents, however, of which neither can be disregarded.

By that conveyance, under which the legal fee in the lands is now vested in Mrs. *Godfrey*, a term of years in possession was limited to him as a trustee for her. The term ended with her minority, nor was the conveyance executed by him: still it had in 1833 the sanction and approval of a Master in Chancery, and clearly must be taken to have had, in the same year, Mr. *Stone's* sanction,

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tion, acceptance and approval also; nor can he be deemed to have been, when his daughter attained majority, in the receipt of the rents of the lands adversely to the Decree of 1830, or to that conveyance. It seems to me, indeed, that having accepted a trusteeship in possession under it, he became, and is disabled from saying, for his own benefit or in his own defence, that he has been in the receipt of the rents adversely to her at any time since the Decree of 1830, or adversely to her husband at any time since her marriage. My impression I repeat is that, as against the present Plaintiff, it must be considered that such possession, as at any time since 1830, he has had in the lands in dispute has been a possession, upon the account and behalf of his daughter, until her marriage, and of her husband since.

But there is more. The evidence in the cause which we are now deciding divides itself into three parts:—1st, documents admitted, and therefore undisputed; 2nd, proof of facts not denied nor disputed; 3rd, proof against and in support of the truth of alleged facts asserted upon one side and denied on the other. Now had the third division been absent, so as to reduce the evidence before us to the two others, I should have considered it a proper inference from them, and a just conclusion to hold, that before the present Defendants' marriage one or both of them had been, by the acts and conduct of the present Plaintiff, induced to suppose and believe, and did accordingly upon that foundation suppose and believe, the lands in question to have become the estate of the Defendant his daughter, in possession, by right upon her majority (if not at an earlier period), and to have continued to belong to her rightfully in possession down to the time of her marriage and at that period; that the Defendant married upon the faith and in the understanding of the true state of her rights being so, and that therefore

therefore it was impossible for the Plaintiff, after the marriage, to institute successfully such a suit as the present against them.

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Upon the hypothesis consequently that I have just been stating, I should have thought it right to dismiss the bill; and this, on principle equally, and on authorities, of which if not all, some of considerable weight, are mentioned in the judgment pronounced by the Master of the Rolls in the recent case of *Money v. Jordan* (a). For I should have held, as I hold, this ground of defence sufficiently put in issue by the passages of the Defendants' answer, that I shall now read:—

“And this Defendant, *Elizabeth Godfrey*, says, and this other Defendant says, he believes that the said Plaintiff always during such time as this Defendant, *Elizabeth Godfrey*, lived with him, and in fact up to the time of her marriage in the year 1847, always in each half-year verbally accounted with this Defendant, *Elizabeth Godfrey*, for the rents and profits received by him in respect of the said real estate; and that the said Plaintiff was in the habit of taking or charging five shillings per week for the board and lodging of this Defendant, *Elizabeth Godfrey*, and handing over to her from time to time what he the said Plaintiff stated to be the difference between that sum and the amount of the rents and profits which he had received for or in respect of the said estate; and that the yearly balance so handed over by the said Plaintiff as aforesaid, generally amounted to between 8*l.* and 10*l.*, out of which this Defendant, *Elizabeth Godfrey*, used to provide herself with clothes. And this Defendant, *Elizabeth*

(a) 15 *Beav.* 373; and see 2 *De G. Mac. & G.* 318, the decision in which case, however, was reversed by the House of Lords, dissentiente Lord St. Leonards.

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beth Godfrey, says, and this other Defendant says, he believes that no written accounts were ever given by the said Plaintiff to this Defendant, *Elizabeth Godfrey*; but the said Plaintiff informed this Defendant, *Elizabeth Godfrey*, or gave her to understand, that the monies from time to time paid to her by him were the balance of the rents and profits of the said lands and hereditaments, and that up to the time of the marriage of these Defendants the said Plaintiff always told this Defendant, *Elizabeth Godfrey*, and admitted that the said lands and hereditaments were the property of this Defendant *Elizabeth Godfrey*, and never made any claim of right to them on his part. And these Defendants say that the said Plaintiff has also subsequently to the marriage of these Defendants, spoken to each of these Defendants of the said estate as being the property of this Defendant, *Elizabeth Godfrey*, and said that he would not wrong this Defendant, *Elizabeth Godfrey*, of one farthing."

The question or the next question then is, upon the effect of the whole evidence as it stands; or, in other words, whether so much of it as is favourable to the Defendants upon the point of the faith, the belief under which they married, and the Plaintiff's liability to have that faith, that belief, treated as the legitimate consequence of his acts and conduct is overbalanced by the residue, and I am of opinion that it is not; the division of it, which I have called the third, appearing to me, on consideration and a just estimate of its several parts, rather to support and strengthen than to weaken the inference, which (as I have said) I should have drawn from the other two alone. Mr. *Stone* alleges, and probably with truth, that Mrs. *Godfrey's* marriage was without his consent, against his wish, and clandestine. But she had been ten years marriageable; he had not acted on the venerable precept, which says, "Marry thy daughter,

daughter, and so shalt thou have performed a weighty matter." And I suppose that in an artizan's family, not less than in others, a maiden of five-and-twenty may not unreasonably consider that she has been single long enough. Now in the house of the widower, Mr. *Stone*, were living not alone the father and daughter, but also a bachelor, Mr. *Godfrey*, who seems to have made himself intelligible to Miss *Stone*, and whom, viewing with approbation, she may well have said to herself, "It is time that I should be married; I am of a steady age; I know that I have a fortune, because my father has told me so, but he manages and seems pleased with managing it. Will he approve of giving it up? May he not consider a son-in-law likely to interfere and be troublesome? Under all the circumstances I think I had better marry Mr. *Godfrey*, and tell my father afterwards." This was natural enough; and it was equally natural that when the father, after the marriage, denied her right to the property, and claimed it as his own, she should say to him, "You made me believe that it was mine, I should not have married without the means of beginning the world. I have taken an irrevocable step in reliance on the truth of your assertion, and that must be irrevocable too."

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Finally, this suit appears to me ill-founded. My learned brother also thinks as I do, that it would not have been right not to dismiss the bill. The bill was dismissed, and we both consider that the Appellant must pay the costs of the appeal. There is, however, a difference of opinion between us as to the nature otherwise of the order proper now to be made; and in that state of things, if the view of either is that our order should be merely one dismissing the Appeal with costs, his view must of course prevail. My learned brother does so hold, and therefore so it will be.

The

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The LORD JUSTICE TURNER.

The Plaintiff in this case, in effect, asks of the Court to raise a trust for his benefit upon the legal estate vested in the Defendant; and he asks this relief upon the footing of an equitable title, which accrued to him in the year 1824.

The ground on which he founds his title to this relief is, that in the year 1826 he was erroneously advised that his equitable title could not be maintained; and I assume that the advice so given to him was erroneous, and that this Court has power (as I feel no doubt that it has) to relieve against mistakes in law as well as against mistakes in fact. When, however, parties come to this Court to be relieved against the consequences of mistakes in law, it is, I think, the duty of the Court to be satisfied that the conduct of the parties has been determined by those mistakes, otherwise great injustice may be done. Parties may be erroneously advised as to the law, but they may be told on what circumstances the question of law depends, and in what mode it may be tried, and they may determine that (whether the advice which they have received be well or ill founded) they will give up the question in favour of the party with whom it arises. Cases of this nature, therefore, require the most careful examination, and particularly when they arise between parent and child.

These considerations have led me to look very carefully into the facts of this case, and upon examining them I am satisfied that this Plaintiff, having been made aware of the question on which his title depended, determined to waive it in favour of the Defendant, his child.

In the first place, the opinion on which he acted was thus expressed—[his Lordship read it.] So that opinion (although

(although it advises him he has not the estate by the curtesy), tells him that it depends on the question whether the possession of the tenants or of the trustee is to be considered as the possession of the wife; and in a farther part of the opinion it is intimated that, if he persists in his claim, he must be made a Defendant to the suit. In that state of circumstances, and having been so advised, he became the next friend of his daughter in a suit instituted by her for the purpose of asserting her title, to the prejudice of his own title; and in the year 1830 a decree was made declaring the rights of the Plaintiff, and that she was entitled in fee, as from the death of the mother; displacing, therefore, the estate by the curtesy in him. In the year 1833 he presented a petition, and upon the hearing of that petition, and of the cause on further directions, he obtained an order for the payment of the rents to him for the daughter's maintenance during her minority. The original decree had directed a partition of the estates. A partition was made, and was to be carried into effect by a conveyance to be executed by the trustee. That conveyance was thus framed: A term of years was limited to him during the minority of the daughter in trust to dispose of the rents as the Court of Chancery should think fit, or otherwise for the maintenance and benefit of the daughter. In the course of preparing that conveyance, the gentleman who was instructed to prepare it, an eminent conveyancer (Master Senior then at the bar), intimated an opinion that Mr. *Stone* was entitled to an estate by the curtesy, and that opinion was communicated to him. It is said, however, that there was communicated to him a retractation of that opinion. The allegation in the bill appears to me to be that the communication which was made to him was the communication of the written opinion given by Mr. *Senior*. But, whether the further opinion was or not communicated to him, beyond all doubt the fact of the opinion having been given, and

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and the fact of the retraction of the opinion (if he knew it) distinctly brought to his mind the question of his title. He entered into possession, nevertheless, under these trusts, and, acquiring possession under a trust created for the benefit of the daughter, he thinks it right, after the determination of the term under which alone he has acquired the possession, to retain it. It is impossible for a person who has acquired possession of an estate under a trust for the benefit of another to be permitted to set upon that possession as adverse to the other. It was his duty, if he meant to claim adversely to the daughter, to have given up possession of the estate, and to have then set up his claim after he had redelivered possession. In the year 1843 the daughter attained twenty-one. No step was taken by the Plaintiff to disturb the title of the daughter; no allegation was set up of any mistake having been made by him; no intimation that he in any way disputed her title. In the year 1847 she married. No question was then raised by him, that I can find, upon her title to this estate. On the contrary, I find it distinctly stated in the affidavits, on the part of the Defendants, and not that I can find contradicted on the part of the Plaintiff, that after the marriage, upon the occasion of Mr. Stone going to visit his daughter, he made a positive promise that he would account to her in respect of the rents of the estate. It was not until he was leaving the house of his daughter that any claim was made by him on his own behalf.

Under these circumstances, I think it clear that Mr. Stone had deliberately determined not to set up the title against the daughter, and that it would be great injustice now to permit him to do so.

In determining the case upon this ground, I desire to be understood as not intimating any opinion that the
Plaintiff

Plaintiff could have succeeded if the case had been more favourable to him in the point of view to which I have referred. On the contrary, I think that the length of time, coupled with the circumstances of the case, would have been sufficient to bar his claim. Some useful observations on that point are to be found in Lord *Redesdale's* judgment in *Cholmondeley v. Clinton* (a).

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My opinion, therefore, upon the whole clearly is, that this Appeal must be dismissed with costs. Perhaps if I had had to deal with the case originally, I should have been of opinion that the bill should also have been dismissed with costs ; but, being very reluctant to interfere with the discretion of the learned judge on the subject of the costs, and finding in the note of what passed at the hearing that there was a disclaimer on the part of the Defendant of any intention to demand costs, as these costs have not been given by the decree, I think the justice of the case will be satisfied by dismissing the appeal with costs.

(a) 4 *Bli.* 35.



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IN the Matter of THE DOVER, HASTINGS AND
BRIGHTON JUNCTION RAILWAY COM-
PANY, and of the JOINT STOCK COMPANIES'
WINDING-UP ACTS.

March 2, 11,
16.

CAREW'S CASE.

Before The
LORDS Jus-
TICES.

By the sub-
scribers' agree-
ment of a
provisionally
registered rail-
way company,
the subscri-
bers, who were
expressed to
be parties of
the first part,
covenanted
with trustees

THIS was the appeal of the official manager from the decision of Vice-Chancellor *Stuart*. The facts, which are fully stated in Messrs. *Smale* and *Giffard's* report of the case below (a), were shortly as follow :—

A railway was projected to be made by a Company to be called the *Dover, Hastings and Brighton Junction Railway Company*. A prospectus was issued, announcing that

(a) 2 Sm. & G. 1.

(who were expressed to be parties of the second part) that they would indemnify the managing directors (who were expressed to be parties of the third part, as distinct parties, and also to be among the parties of the first part). Preliminary prospectuses were circulated, naming the managing directors, among whom was *F.* (who was named also in the deed as one of the parties). *F.* never agreed to be connected with the undertaking, but expressly declined to be so. None of the managing committee paid any money or executed the deed. On the company being wound up:—*Held,*

1. That a call on the subscribers, exclusively of the managing committee, as primarily liable under the covenant for indemnity, ought not to have been made.

2. That, on a motion of some of the subscribers to discharge a call, the Court could not properly make an order staying all proceedings under the winding-up order, and directing the official manager to repay all monies which he had received, the notice of motion not seeking such an order, and some of the Respondents, who were served, not having appeared.

3. That the official manager was entitled to appeal from the order.

4. *Seemle*, that the order to stay all proceedings could not have been properly made without the creditors who had proved, and the subscribers who had overpaid, being before the Court.

5. That the absent parties were not sufficiently represented by the official manager.

6. Leave having been given to serve with notice of an appeal, from an order staying all proceedings made on a motion to discharge a call, a member of the committee, who had not been served with the original motion to discharge the call;—*held*, that he could not object that the appeal was out of time.

that the capital was to consist of 300,000*l.* in shares of 20*l.* each, with a deposit of 2*l.* 2*s.* per share. A number of provisional directors were named in this prospectus, one of whom was Mr. *Frewin*.

A subscribers' agreement was prepared and engrossed early in *October*. It purported to be made between the persons whose names appeared in a schedule of the first part, trustees of the second part, and fifteen other persons, (described as being some of the parties of the first part,) of the third part. The parties of the third part were to be the managing committee, and the deed provided that every managing committeeman should take forty shares; and the parties of the first part covenanted as follows:—"And further, the parties hereto of the first part shall and will save, defend, keep harmless and indemnify the said managing directors, and each and every member thereof, of and from all payments, losses, costs, charges, damages and expenses which such managing directors, or any member thereof, have or hath already incurred or become liable to in or in reference to the formation of the said intended railway, or the establishment of the said company, before or since the provisional registration thereof, or shall or may incur, bear, pay, sustain, become liable for, or be put unto in the exercise and execution of the powers and authorities hereby vested in them or him as such managing directors or director; and that the several sums of money so deposited as aforesaid, or hereafter to be deposited by the parties hereto of the first part in respect or on account of the respective shares of the parties hereto of the first part in the said Company, shall be charged and chargeable with such payments, losses, costs, charges, damages and expenses; and the managing directors for the time being of the said Company shall be at liberty to apply all or any portion of such sums of money in payment and discharge

1854.

In re
THE
DOVER, &c.
JUNCTION
RAILWAY
COMPANY, &c.
CAREW'S
CASE.

1854.

In re
 THE
 DOVER, &C.
 JUNCTION
 RAILWAY
 COMPANY, &C.
 CAREW'S
 CASE.

discharge of such sums, losses, costs, charges, damages and expenses."

This deed was never executed by the trustees or by any of the persons named as parties of the third part.

On the 11th of *October* Mr. *Frewin* had been requested by one of the solicitors of the Company to execute the Company's deeds, but he refused, and desired that his name might be struck off the list of managing directors, stating that although he was favourable to the scheme, he had taken and would take no part in its affairs.

The deed was executed by nineteen subscribers, parties of the first part, in respect of 450 shares, amounting to 9,200*l.*, on account of which 715*l.* was paid up.

Early in *December* the project was abandoned, and on the 6th of *August* 1849 was ordered to be wound up under the provisions of the act.

The Master in 1851 settled upon the list of contributories the managing committee, and also the subscribers who had executed the subscribers' agreement.

On the 24th of *June* 1853 the Master made an order, declaring that the persons who had paid their subscriptions, and executed the deed containing the covenant to indemnify the managing directors, were bound by that covenant, and were alone liable to a call, and he accordingly made the call upon them, and not on the contributories, who were on the managing committee. Some of the contributories appealed to the Vice-Chancellor against the order for this call.

The

The Vice-Chancellor, by the order under appeal, directed that the order of the Master should be discharged, and that all further proceedings in the matter should be stayed under the order dated the 27th of *July* 1849 for winding up the said Company, and that the official manager of the said Company should repay all the monies paid to him, to the persons from whom he received the same, with liberty for the official manager to make such application to the Court relating to his costs as he might be advised.

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CASE.

Mr. *Roxburgh* supported the appeal.

Mr. *Malins*, Mr. *Chichester*, and Mr. *Dickinson* were for some members of the managing committee.

Mr. *Chandless* and Mr. *W. H. Terrell*, and Mr. *Daniel* and Mr. *Selwyn*, for others, cited *Thompson v. The Universal Salvage Company (a)*.

Mr. *Henry Stevens* appeared for Mr. *Cory*, the Petitioner for the winding-up order.

Mr. *Charles Hall* and Mr. *Wyllys Mackeson* appeared for other parties.

Mr. *Roxburgh*, in reply.

The LORD JUSTICE KNIGHT BRUCE.

March 16.

Three motions in this matter, on the part of different persons, coming on together in 1853 and in the present year before one of the learned Vice-Chancellors, produced the order now under appeal, which was made in *January* last, an order the result certainly of an earnest and

(a) 3 *Exch.* 310.

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and (I may perhaps be permitted to add) a most laudable desire, on the part of the learned judge, to end a vexatious and harassing litigation by doing final and complete justice to and upon all unhappy enough to be concerned in it. In the way of this, with such materials only as his Honor had to deal with, there were great difficulties which he thought not insurmountable. I have tried to think so, but have not been able to persuade myself of it.

His Honor has directed a stay of all proceedings under the order made in August 1849, which, directing the Company or Association, or inchoate Company now before us, to be dissolved and wound up, was under the statutes of 1848 and 1849, or under the former of those statutes, the origin and foundation of the Court's jurisdiction to hear the motions. But no such thing was asked by the motions, or by any one of them, nor has the order of 1849, so far as I am aware, been ever sought to be discharged. It remains in force, subject only to the stay or partial stay caused by that under appeal. Now the mere circumstance that an order on a motion goes beyond the terms of the notice may be immaterial, as between those who have taken part in the debate or appeared upon it; not so, I apprehend, as to persons interested, who, served with the notice, have done neither, but rested on their right to assume that nothing beyond the notice would be asked or done. This consideration seems of itself fatal to the order of *January* last, for, as I understand, some persons interested in the subject, who were properly and necessarily served with notice of the motions, or of one of them did not appear before the Vice-Chancellor; and of these, some at least I believe have not appeared before us.

If all served had however appeared, still I should respectfully

spectfully have dissented from the order for more than one reason; not only because, in my judgment, there was and is an insufficiency of evidence to support it;—not only because, upon the materials before us, it seems to deprive Mr. *Cory* (who, in 1849, obtained the original order) of a provision for rights, which at present there seems ground for holding him entitled to demand some provision for,—but also because certain persons who, as creditors, have proved debts in the Master's office under that order, having not been served with notice, have not had an opportunity of contending that the ordinary course of proceeding under it ought not to be interrupted, restrained or varied. The question is not whether they could successfully so contend, or whether they have or had an interest in the contention. It is, whether an order such as that of *January* last, could be made without affording them an opportunity of being heard. I think that it could not. Neither have they, on the present occasion, been served.

It has been insisted, on the part at least of one Respondent, Mr. *Dayrell*, that the only Appellant here, the official manager, had no title to appeal, and is without a standing place. To this argument I have been unable to accede. He was I believe served, necessarily served, with the three notices of motion,—appeared and addressed the Court on them, as it was his right and his duty to do,—is affected by the order that he appeals against, and, if we should assume that it provides sufficiently for his costs and remuneration, as far as merely his personal interest is concerned (though I do not so assert), still he is directly interested in its regularity or irregularity, supportableness or insupportableness. And his right to bring the appeal here, as to the entire case, involved in the order, was and is, in my judgment, clear and unquestionable.

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But Mr. *Dayrell's* learned counsel have also argued that the appeal is barred by lapse of time ; and it is true, I believe, that, when Mr. *Dayrell* was served with notice of the appeal motion, more than three weeks from the day of making the order of *January* had elapsed. But the notice was served earlier, and in due time and manner, on those whose motions the three original motions were, and that, in such a case at least as the present, was sufficient to save the lapse, it having been the act of ourselves to require service on others. This objection, therefore, also in my opinion fails.

These are the reasons of which I reserved the statement, when, on the 11th of the present month, we informed the counsel, that we should discharge the order of *January*, and hear the reply as to the nature of that to be substituted for it, which now we have done ; and we have come to the same conclusion as the Vice-Chancellor respecting the call, namely, that it cannot stand. The materials before the Master were not, nor are those before us, sufficient, as I conceive, to sustain it, made as it was exclusively on those who had actually executed the deed constituting, or intended, or professing to constitute this Company or Association. And in saying "exclusively," I do not intend to intimate an opinion whether on those materials alone it could have been, or can be, properly made upon any of them at all.

The covenantors in the deed are the parties to it, of the first part ; but they covenant to indemnify those only, who were or should become some of the parties to it of the first part, and so liable to the covenant, not less than the other parties of the first part. Again, upon the evidence as it stands, Mr. *Frewin* was untruly represented to the actually executing parties to the deed as a managing director ; nor do I see at present anything enabling me

to say either that this misrepresentation was immaterial, or that they have not a right to charge with it some at least of those who were in truth managing directors, and to have them dealt with accordingly.

Perhaps additional evidence may hereafter be brought forward. At present the proper order, to substitute for that of *January*, seems to me to be, to discharge the call, and to give all parties their costs of the motions, before the Vice-Chancellor and here, out of the estate. Thus far I think that we may go, without requiring service on the creditors.

The LORD JUSTICE TURNER.

I certainly should have been very glad if I could have found my way to support the order made by the Vice-Chancellor. By that order, he has discharged the call which was made in *June* 1853, has directed all further proceedings in the matter to be stayed, and has ordered the official manager to refund the money which he has received, and given him liberty to apply with respect to his costs. The first difficulty in this order, as it appears to me, is this—a number of creditors have proved their debts in the Master's office under the winding-up order, to the amount of some 6,000*l.* or 7,000*l.* Now, it may be quite true that those creditors may not have a right of themselves to apply to this Court for the purpose of having their debts paid out of the estate, but it is equally clear, that every shareholder or contributory to the Company has an interest in those creditors being paid, because each of the creditors may undoubtedly institute proceedings against some or other of the contributories for the purpose of recovering his debt; and it is a necessary element in the winding up, that those creditors should be paid in some way or other. If we had
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before us every contributory, it might be possible that they might say, as among themselves, "We will make arrangements for the payment of the creditors, and stay all proceedings for winding up." But all the persons who are contributories are not before the Court on the present motion, and, therefore, their interests in respect of the payment of the debts will, in truth, be entirely disregarded if this order be maintained.

Again, the contributories comprise not only persons who are liable for the debts of the Company who are but persons also who have made overpayments on account of the Company, and have a right to have the amount of what they have overpaid ascertained. We have nothing here to shew that some of these persons, who do not appear on the present occasion, may not have a right to receive back some monies which they may have paid on account of the Company. It seems to me, therefore, that the order made in the absence of all the parties interested cannot be maintained.

It has been argued, that the official manager sufficiently represents the creditors and the absent shareholders, but I apprehend that the official manager is in the nature of a trustee. It is his duty to see that all the proceedings under the winding up are regular, and to attend the Court for the purpose of informing the Court, and taking care the proper orders are made in these cases.

I think that the order of the Vice-Chancellor cannot be maintained. I should have been very glad indeed, if I could have seen my way to declare the rights and liabilities of the parties, and I have looked at the case with that view; but in the state of the evidence before us,
 I do

I do not see my way to such a declaration. I am afraid that nothing can be done, but to discharge the order for the call, and to discharge the order made by the Vice-Chancellor.

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DRYSDALE v. MACE.

THIS was an appeal from the decision of Vice-Chancellor *Stuart*, dismissing with costs a claim for the specific performance of an agreement for the purchase of a freehold estate in fee simple in reversion.

The case is reported in the 2nd volume of Messrs. *Smale and Giffard's Reports*, page 225, where the facts will be found fully stated. The following is a summary of them:—

The property had been put up for sale by auction, and not having been then sold was subsequently sold by private contract to the present Defendant, subject to printed conditions, which had been prepared for the sale by auction. Before the contract was entered into, the auctioneer requested the Defendant to take the advice of his solicitor upon the conditions.

The ninth condition of sale was as follows:—

"That a statement in a deed of the 21st of December 1839, that a life annuity granted to *George Morris* in

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By an agreement for the sale of a reversionary estate in fee, it was stipulated, that a statement in a deed of 1836, to the effect that a life annuity granted to *A. B.* had not been paid or claimed for eight years (supported by a declaration of the vendor that no claim had been made upon him since 1841, and that he believed that the annuity had not been claimed for the last twenty years), should be conclusive evidence that the annuity had

April

determined. It appeared that the annuity was granted by a person entitled in reversion, and was granted for the life of the survivor of four persons, two at least of whom were living:—*Held*, that the omission to state these circumstances disentitled the vendor to enforce the stipulation in a specific performance suit instituted by him.

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April 1824 had not been paid or claimed for eight years previously, and which will be supported by a declaration by the vendor that no claim has been made on him since the decease of his testator in 1841, and that he believes that the same has not been claimed for the last twenty years, shall be conclusive evidence of the fact of such annuity having determined, and of the cesser of the term limited for securing the same."

On the abstract being delivered, it appeared from a recital in one of the deeds abstracted, that by an indenture dated the 8th of *April* 1824, the then owner of the reversion and a surety covenanted to pay an annuity of 36*l.* for the lives therein mentioned to *George Morris*, his executors, administrators and assigns; and also demised the reversion to a trustee for a term of five hundred years, upon trust, in case the annuity should be in arrear for one calendar month, to sell the property, and by means of the money thereby raised to secure the annuity in manner therein mentioned.

It did not appear on the abstract for how many lives the annuity was granted; but the Defendant's solicitor ascertained that the annuity was payable during four lives and the life of the survivor, and that two at least of the lives were in existence.

Mr. *Malins* and Mr. *T. Stevens*, for the Appellant.

The ninth condition is clear and unambiguous, and was acceded to by the Defendant, not hastily in an auction-room, but after advising with his solicitor. It must therefore have the same effect as any other stipulation entered into with deliberation between competent persons properly advised; *Hume v. Bentley* (a). The

notice

(a) 5 *De G. & Sm.* 520.

notice afforded by the agreement of the deed of 1837 is notice of all its contents; *Fenton v. Browne* (a), and *Trower v. Newcome* (b). The price was regulated with reference to the risk of having to pay the annuity, and it would be most unjust to give the purchaser the benefit of the reduction of price without his being bound by the stipulation in consideration of which the reduction was obtained.

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The LORD JUSTICE TURNER referred to *Southby v. Hutt* (c), and *Warren v. Richardson* (d).

The LORD JUSTICE KNIGHT BRUCE referred to *Seaton v. Mapp* (e), and Lord St. Leonards' *Concise View of the Law of Vendors and Purchasers* (f). His Lordship also referred to *Cox v. Dolman* (g).

Mr. Bacon and Mr. Younge for the Respondent were not called upon.

The LORD JUSTICE KNIGHT BRUCE.

Though I do not attribute wrong intention to the Plaintiff or his solicitors in this case, and though the conditions of sale do not perhaps contain any statement strictly untrue or strictly incorrect, I am of opinion that the ninth condition might well, and would better, have been otherwise than it is. I think that it should have mentioned, according to the fact, that the annuity called in it "a life annuity," had been granted for the lives of four persons and the life of the longest liver of them, and should have explained that the annuity, though created

(a) 14 Ves. 144.

(b) 3 Mer. 704.

(c) 2 Myl. & Cr. 207.

(d) Younge, 1.

(e) 2 Coll. 556.

(f) Page 243.

(g) 2 De G. M. & G. 592.

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created by a predecessor in title of the vendor, was so, not by an owner of an interest in possession in the landed property in question, but by one who had only an interest in that property in remainder or reversion; that is to say, an interest subject to the same life estate of the lady (stated in the particulars to be in her seventy-first year) as existed at the time of the contract in litigation. Whether considering *Cox v. Dolman* (a) as bearing or not bearing importantly on the subject, it seems to me no slight matter that, upon that lady's decease heavy arrears of the annuity may (I do not say with a certainty, but with a possible chance of success) be claimed and sought to be raised out of the property by means of the term created in 1824 for the purpose of securing the annuity; for that term must be taken to be now in fact subsisting. Two of the four lives, it appears, were in existence at the date of the contract; nor is either of the two shewn to have ceased. The memorial registered of the grant of the annuity, which was not before the Vice-Chancellor, has been produced before us, and seems to be not unlikely to raise an arguable question. I conceive, however, that we cannot enter into that, but must, for every present purpose at least, treat the grant as valid.

Under these circumstances the case is, I agree with the learned Vice-Chancellor, not one for specific performance. The Plaintiff may do what he can at law. As to costs there should, I think, be none of the Appeal, but I am not so clear that the claim ought to have been dismissed without costs as to render it right for me to say that those already given should be taken away.

The LORD JUSTICE TURNER.

The case turns upon two points: First, what was the effect

(a) 2 *De G. M. & G.* 592.

effect of the description of the annuity, as a life annuity, granted to *George Morris*; secondly, the effect to be given to the condition that certain evidence should be conclusive as to the annuity having determined.

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As to the first point,—if an annuity is described to a purchaser as a life annuity granted to a specified person, the purchaser cannot collect from such a description that the annuity was granted for four lives. It is the duty of a vendor to make his conditions clear. It is said, however, that the condition in this case is so worded as to put the purchaser on inquiry; as was held in the cases where a leasehold estate was stated to be renewable on payment of a small fine, and where an advowson was sold with a representation that there was a prospect of a speedy vacancy. But those expressions were vague, and could not lead a purchaser to any definite conclusion. Here terms are used calculated to lead the purchaser to believe that the annuity was only for one life.

As to the second point, I am not so clear. I think that there is considerable doubt whether the purchaser did not contract to buy the estate, subject to the risk, whether the annuity was subsisting or not, but I am disposed to think that the true construction of the contract is, that the purchaser, although not entitled under the conditions to require the vendor to furnish further evidence that the annuity had determined, bought, nevertheless, on the footing, that the annuity was not subsisting.



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Between WILLIAM FRANCIS, late an Infant,
Plaintiff,

and

HENRY FRANCIS, ABSALOM FRANCIS
and ALICE FRANCIS, Defendants ;

and

Between the said WILLIAM FRANCIS, Plain-
tiff,

and

JOHN FINCH, WILLIAM THOMAS and
GEORGE MORGAN, Defendants ;

And in the Matter of WILLIAM HICHENS and
WILLIAM HICHENS the Younger ;

Ex parte WILLIAM FRANCIS and ALICE
FRANCIS ;

Ex parte WILLIAM HICHENS, and WILLIAM
HICHENS the Younger.

March 17, 20.

Before *The*
LORDS Jus-
TICES.

THESE were two petitions, in the nature of a peti-
tion and cross petition, against the confirmation of

A trustee under a will committed a breach of trust by lending trust monies to his co-trustee upon a mortgage for a term of years. An administration suit was instituted, and he was ordered to pay the money into Court. He sold part of the mortgaged property under a power of sale in the mortgage, and, on the application of two of the cestuis que trustent, the proceeds were paid into Court, subject to an order that they were not to be paid out without the consent of the purchaser. The trustee's solicitors refused to give up the mortgage deeds unless upon payment of their bill of costs :—*Held*, parts

1. That the circumstances of the realization of the trust fund by the trustee's solicitors, and of the cestuis que trustent availing themselves of that realization, did not entitle the trustee's solicitors to a lien on the deeds or on the fund in Court, as against the cestuis que trustent, but that they could have no higher claim against the deeds or the fund than that of their client, the trustee.

2. That by instituting an administration suit, and obtaining an order against the trustee personally for payment of the trust monies into Court (which order had not been obeyed), the cestuis que trustent had not waived their right to pursue the trust money into the unauthorized investment.

parts of the Master's report. The case is reported ante, Vol. 2, page 73, upon a question of jurisdiction, arising on the original petition, on which the reference to the Master was directed. The merits were now to be disposed of, on the facts in evidence, and found by the Master.

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They were so far as is material as follows:—

William Francis, by his will dated the 14th of September 1829, directed that all monies belonging or due to him at the time of his decease should be laid out in such securities, buildings, or in purchases, as his trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, should, in their and his judgment and discretion, think most advantageous, and be for the benefit and interest of his wife and children, subject to the purposes of that his will; the whole of which monies, together with all, every and singular the goods and chattels, real and personal estate, lands, property, premises, substance and effects whatsoever, and wheresoever situate or being, that he should die possessed of, or which should or might belong or come to him after his death, he gave, devised and bequeathed unto *William Francis*, *Henry Francis* and *Absalom Francis*, and the survivor of them, and the executors, administrators and appointees of such survivor, in trust nevertheless to permit and suffer the testator's wife *Alice* to receive and use the rents, issues and profits arising or to arise from such monies, securities, buildings, purchases and effects for her own maintenance and the maintenance, education and bringing up of his children during her widowhood; and from and immediately on her marrying again or dying, which should first happen, then in trust for the maintenance, education and bringing up of his children, until the youngest of them (who should come of age) should

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should be twenty-one years old; and on such of his children coming of the age of twenty-one years, and in case his said wife should be then or theretofore married again or dead, he gave, devised and bequeathed all, every and singular the said monies, securities, buildings, purchased goods and chattels, real and personal estate, lands, property, premises, substance and effects, or such of them respectively as should be then in being, and accumulated unto his said children, share and share alike, as tenants in common.

The testator died in 1837, leaving *Alice Francis*, his widow, and the Plaintiff, *William Francis*, his only child him surviving, and he also left him surviving the Defendant, *Henry Francis* and *Absalom Francis*, two of the executors and trustees named in his will, but *William Francis*, the other executor and trustee, died in the lifetime of the testator.

The will and codicil were proved by *Henry Francis* and *Absalom Francis* on the 28th of December 1837.

By an indenture, dated the 22nd of October 1841, and made between *Absalom Francis* of the one part, and *Henry Francis* of the other part, in consideration of 1,000*l.* therein expressed to be paid by *Henry Francis* to *Absalom Francis*, *Absalom Francis* demised unto *Henry Francis*, his executors, administrators and assigns, certain hereditaments belonging to *Absalom Francis* for 500 years, subject to redemption upon payment, by *Absalom Francis*, his executors, administrators or assigns, unto *Henry Francis*, his executors, administrators or assigns, of 1,000*l.* with interest.

By another indenture, dated the same 22nd of October 1841, and made between *Absalom Francis*, *Richard Powning*,

Powning, Matthew Francis, John Henry Joseph Howell and William Davey, of the one part, and *Henry Francis*, of the other part, in consideration of 2,000*l.* therein expressed to be paid by *Henry Francis* to *Absalom Francis, Richard Powning, Matthew Francis, John Henry Joseph Howell* and *William Davey*, certain leasehold hereditaments were demised unto *Henry Francis*, his executors, administrators and assigns, for the residue of a term of ninety-nine years, except the last two days thereof, for securing the repayment of 2,000*l.* and interest, and the deed contained a power of sale.

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The Defendants, *Absalom Francis* and *Henry Francis*, by their joint answer, admitted (as the fact was) that the sum of 1,000*l.*, secured by the first-mentioned mortgage, and the sum of 1,746*l.* 10*s.* 4*d.*, part of the 2,000*l.* secured by the secondly-mentioned mortgage, were part of the residuary personal estate of the testator *William Francis*, which had come to the hands of *Henry Francis* as one of the executors and trustees of the will; and they also admitted that the clear residuary estate of the testator come to the hands of the said Defendant, including those sums, amounted to 3,246*l.* 10*s.* 4*d.*

By an order made in the causes on the motion of *William Francis* on the 31st of *January* 1845, it was ordered that the Defendant *Henry Francis* should, on or before the first day of the then next Easter Term, or thereafter within a week of service of the order, pay into the bank, with the privity of the accountant-general, to the credit of the cause 3,246*l.* 10*s.* 4*d.*, admitted by the answer of the two Defendants to be the amount of the clear residue of the personal estate of the testator come to their hands, together with another sum therein mentioned; such sums to be invested, and the dividends thereof from time to time

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time accumulated, subject to the further order of the Court.

By the decree made at the hearing on the 26th of *November* 1846, the usual accounts were ordered to be taken of the estate and effects of the testator, and the Master was to be at liberty to state any circumstances specially as to any investment or investments of any part of the testator's estate.

The order of the 31st of *January* 1845 was duly served, but no part of the 3,246*l.* 10*s.* 4*d.* had been paid by *Henry Francis* into the bank.

In *January* 1845, the Defendant *Absalom Francis*, and *William Davey* and *Matthew Francis* were duly declared bankrupts.

The *Chester* and *Holyhead* Railway Company took, for the purposes of their railway, part of the hereditaments comprised in the two mortgages, and the purchase and compensation monies payable by them to *Henry Francis* were adjusted at 500*l.* *Henry Francis* executed a conveyance of these hereditaments to the Company, but did not deliver the conveyance to them.

On the 5th of *February* 1846, *Henry Francis*, in pursuance of his power of sale under the secondly above-mentioned mortgage, contracted to sell to *John Evans Humphreys*, for 500*l.*, the leasehold hereditaments comprised in that security, except those taken by the railway company. Mr. *Humphreys* afterwards contracted with the parties interested for the purchase of the inheritance of the mortgaged hereditaments, and for the application of the purchase-money in payment of the mortgages.

In *November* 1848, a conveyance of the hereditaments
 unto

unto and to the use of Mr. *Humphreys*, his heirs, appointees and assigns, was executed, but it had not been delivered to Mr. *Humphreys*.

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By an order made in the causes on the 14th of *June* 1851, on the petition of the Plaintiff, it was ordered that Mr. *Humphreys* should be at liberty, on or before the 25th of *July* then next, to pay into Court to the credit of the first above-mentioned cause the sum of 905*l.*, subject to the further order of the Court; and, upon such payment being made, it was ordered that the Defendant, *Henry Francis*, should deliver up to Mr. *Humphreys* the conveyance of the property executed as above-mentioned, and all other deeds, papers and writings relating to the hereditaments in his possession or power; and it was ordered that the *Chester* and *Holyhead* Railway Company should be at liberty, on or before the 27th day of *July* then next, to pay into Court, to the credit of the first-mentioned cause, the sum of 500*l.*, together with the sum of 41*l.* 13*s.* 4*d.* the amount of interest thereon. And, on such last-mentioned payment being made, it was ordered that the Defendant, *Henry Francis*, should deliver up to the railway company the conveyance to them, and instead of the sum of 3,246*l.* 10*s.* 4*d.* (the amount directed, by the order of the 31st of *January* 1845, to be paid into the bank to the credit of the cause, it was ordered that the Defendant *Henry Francis* should, within a week after service of the now stating order, pay into Court 1,796*l.* 10*s.* 4*d.*, subject to further order; and it was ordered that the several sums when paid in should not be paid out without notice to Messrs. *Hichens* and Son, Mr. *Humphreys* and the railway company.

Messrs. *Hichens* and Son had acted as solicitors for the Defendants, *Henry Francis* and *Absalom Francis*, in the causes, and claimed to have a lien on the deeds for
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certain costs alleged to be due to them from *Henry Francis*, and for monies alleged to have been advanced to him by them or one of them.

William Hichens acted as such solicitor in putting in the answer of the Defendants, *Henry Francis* and *Ab-salom Francis*, wherein they made the admissions above-stated.

The Master found that there was not any debt remaining due and owing from the estate of the testator.

By an order of Vice-Chancellor *Parker*, on the petition of *William Francis* and *Alice Francis*, dated the 17th of *January* 1852, after expressing that the Court was of opinion that *William Hichens* and *William Hichens* the younger had no lien on the deeds and conveyances in the petition mentioned as against *William Francis* and *Alice Francis*, it was ordered that *William Hichens* and *William Hichens* the younger should, within fourteen days after service of that order, produce and leave in the office of the Master upon oath all the conveyances and deeds, papers and writings in their custody or power relating to the premises in the petition mentioned.

On the 28th of *February* 1852, *William Hichens* and *William Hichens* the younger presented their petition of appeal from this order, and it was this appeal which raised the question of jurisdiction, as to which the case is reported, ante, Vol. II., p. 27. By the order then made, it was expressed that their Lordships, being of opinion that the Petitioners *William Hichens* and *William Hichens* the younger jointly, and *William Hichens* severally, had a lien for the debts respectively due to them

them jointly, and to *William Hichens* severally, from the Defendant, *Henry Francis*, on such interest, if any, as the Defendant, *Henry Francis*, had in the 1,446*l.* 13*s.* 4*d.* cash in the bank on the credit of the first-mentioned cause, the Court ordered that so much of the bank annuities directed to be purchased by the order of the 17th of *January* 1852, with the residue of the said cash, after the payments by the said order directed, as should be purchased with the sum of 600*l.* part thereof, should not be sold, transferred or otherwise disposed of without notice to the Petitioners, *William Hichens* and *William Hichens* the younger; and it was ordered that such lien (if any) as *William Hichens* and *William Hichens* the younger, or either of them, had upon the deeds and documents in the order mentioned or referred to, as against the Defendant, *Alice Francis*, and the Plaintiff, or either of them, should be made good out of the bank annuities so to be purchased with the said sum of 600*l.*; and it was ordered that it should be referred to the Master to inquire and state to the Court whether, as between *William Hichens* and *William Hichens* the younger, or either of them, on the one hand, and the Defendant, *Alice Francis*, and the Plaintiff on the other hand, *William Hichens* and *William Hichens* the younger, or either of them, had any lien on the deeds and documents in the order mentioned or referred to, and if so, for any and what amount, and under what circumstances. And the now stating order was to be without prejudice to any question of lien as between the Petitioners, or either of them, and the Defendant, *Absalom Francis*, or his assignees.

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On the 27th of *February* 1854, the Master made his report, and found that as between *William Hichens* and *William Hichens* the younger on the one hand, and the Defendant, *Alice Francis*, and the Plaintiff on the other hand,

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hand, *William Hichens* and *William Hichens* the younger had a lien on the deeds and documents for the amount of their bill of costs in and about the sales of the property comprised in the mortgages of the 22nd of *October* 1841, so far as such sales were conducted by them. The Master found that their costs had been taxed by the Taxing Master at 27*l.* 16*s.* 4*d.*, which sum the Master therefore found was the amount for which Messrs. *Hichens* and Son had such lien as aforesaid under the circumstances thereinbefore mentioned.

Neither party being satisfied with this finding, two petitions were presented, one by the Plaintiff and *Alice Francis* praying that it might be declared that, as between *William Hichens* and *William Hichens* the younger, or either of them, on the one hand, and the Petitioners on the other hand, the said *William Hichens* and *William Hichens* the younger, or either of them, had no lien on the deeds and documents in the order of the 17th of *January* 1852 mentioned or referred to, or that it might be referred back to the Master to review his report as to the said lien and the amount thereof (if any); the other, which was that of Messrs. *Hichens* and Son, praying that the report might be reviewed as to so much as certified that, as between the Petitioners on the one hand, and the Defendant, *Alice Francis*, and the Plaintiff on the other hand, the Petitioners had not nor had either of them any other lien on the deeds and documents in the said order mentioned or referred to; and that it might be declared that the Petitioners had such lien in respect of the sum of 253*l.* 9*s.* 8*d.*, the proper monies of *Henry Francis*; and that the sum of 253*l.* 9*s.* 8*d.* might be ordered to be paid to the Petitioners out of the fund in Court; and that the sum of 27*l.* 16*s.* 4*d.*, and also the costs of the order of the 26th of *March* 1852, and of the proceedings thereon, and of that application, might be ordered

ordered to be paid to the Petitioners out of the fund in Court.

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Mr. *Wigram* and Mr. *J. V. Prior*, in support of the petition of *William Francis* and *Alice Francis*, cited *Stickney v. Sewell* (a); *Blunden v. Desart* (b); *Molesworth v. Robbins* (c); *Pelly v. Wathen* (d); and contended that, as the fund in Court was much less than the amount due from *Henry Francis* to these Petitioners, and the deficiency arose from his committing a breach of trust, *Henry Francis* could claim nothing in respect of his costs, and that Messrs. *Hichens* and Son could be in no better position.

They also referred to *Baker v. Henderson* (e); *Bell v. Taylor* (f).

Mr. *Daniell* and Mr. *W. A. Collins*, for Messrs. *Hichens* and Son.

Even if this suit had been framed so as to adopt and to seek the benefit of the mortgages, and they had been realized in the suit under the direction of the Court, the costs of the realization would have been the first charge upon the proceeds. Nor is the right of the solicitors restricted to the extent of that of *Henry Francis*, for a solicitor, who recovers a fund, acquires thereby a lien upon it for his costs as against those who take advantage of his exertions in its recovery. *Chester v. Rolfe* (g). But the suit in this case is not in the nature of a foreclosure suit. It is an administration suit. One of the incidents to the nature of such a suit is, that the costs of realizing

(a) 1 *Myl. & Cr.* 8.

(b) 2 *Dr. & War.* 405.

(c) 2 *Jo. & Lat.* 358.

(d) 1 *De G. M. & G.* 16.

(e) 4 *Sim.* 27.

(f) 8 *Sim.* 216.

(g) 4 *De G. M. & G.* 798.

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realizing the assets should be paid out of their proceeds; *Armstrong v. Storer* (a); *Bryant v. Blackwell* (b). *Pelly v. Wathen* (c) is cited on the other side; but even there one of your Lordships doubted whether, as regarded the costs of obtaining the conveyance, the solicitors had not a lien on the deeds. And in *Blunden v. Desart* (d), also cited against us, Lord *St. Leonards* said, "I agree with Lord *Cottenham*, that it requires a strong case to induce the Court to take the papers from the solicitor, without actual payment to himself of the demand; *Richards v. Platel* (e)." Suppose a defaulting trustee to send deeds relating to the trust by a carrier, would the carrier's lien on the deeds be affected by the breach of trust? In *Groom v. Booth* (f), (a case resembling the present, which was lately decided by Vice-Chancellor *Kindersley*,) one trustee sold out stock with the concurrence of the other, to whom he gave a security for its replacement: the former became bankrupt, and an order for sale was obtained from the Court of Bankruptcy, directing the costs of the sale to be paid out of the proceeds. The purchaser objected to complete, on the ground that this would be a breach of trust, but the Vice-Chancellor said that it was right and just that the costs of the petition should be paid out of the trust fund; and his Honor decided that the Commissioner had jurisdiction, and had made a proper order in directing the sale, and in directing the costs to be paid out of the trust fund.

They also cited *Joyce v. De Moylens* (g); *Davies v. Vernon* (h).

Mr. *Wigram* was not heard in reply.

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(a) 14 *Beav.* 535.

(b) 15 *Beav.* 44.

(c) 1 *De G. M. & G.* 16.

(d) 2 *Dr. & War.* 423.

(e) *Cr. & PR.* 79.

(f) 1 *Drew.* 548.

(g) 2 *Jo. & Lat.* 374.

(h) 6 *Q. B.* 443.

The LORD JUSTICE KNIGHT BRUCE.

Considering the position, conduct and liability of Mr. *Henry Francis*, and the notice—the knowledge that Messrs. *Hichens* all along had—I apprehend it to be clear that we must deal with the contention between the two sets of Petitioners before us as if the documents, represented for every present purpose by the fund now in Court, had been in the hands of Mr. *Henry Francis* during the whole time that they were in the hands of Messrs. *Hichens*, whose right (if any) against the other Petitioners, or either of them, cannot be more or greater than that (if any) of Mr. *Henry Francis*. But the debt from that gentleman to Mrs. *Francis* and the Plaintiff, created by the breach of trust committed as to the testator's estate, has not been satisfied. It remains (as I understand the matter), and will (after crediting Mr. *Henry Francis* with the fund in Court as a payment by him) remain unsatisfied to an extent exceeding the utmost amount now claimed by Messrs. *Hichens*. Accordingly they have not, in my opinion, nor has either of them, legally or equitably, a just demand or lien upon that fund, or any part of it.

I may add that, in my opinion, the result would be the same if it could be said that Messrs. *Hichens*, knowing as they did the facts, had held the documents as the solicitors of *Absalom Francis* as well as of *Henry Francis*, for *Absalom Francis* was a party to the breach of trust, and was *Henry's* mortgagor, to say nothing of *Absalom* not having been shewn to have obtained his certificate.

The second petition of Messrs. *Hichens* must, therefore, be dismissed with costs. They must pay the costs of their former petition, and the costs in the Master's office,

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office, and the costs also of the petition of the Plaintiff, and Mrs. *Francis*, except so far as the last-mentioned costs have been increased by the circumstance of the Master's conclusion having been, that Messrs. *Hichens*, or one of them, had, to some extent, a lien or demand, available in this dispute. Neither of those two gentlemen can have any portion of the fund.

The LORD JUSTICE TURNER.

The case stands thus:—Trust money was lent upon mortgage securities in breach of trust. One of the trustees was ordered to pay into Court the whole amount of the trust money. He proceeded to realize the securities. The purchase-money arising from this realization has been paid into Court. The question is, whether the Court ought to direct the expenses of sale to be discharged out of the money so paid in. In order to answer this question we must inquire, what was the position of the trustee? It was this, he held the mortgage, subject to the lien of his *cestuis que trustent* upon it, to the extent of the misapplied trust fund, and could take no benefit from the security until the lien was satisfied. His solicitors could be in no better position than himself. It is said, however, that the costs of realizing the securities would have been allowed, if they had been realized in the suit. I take it, however, to be clear that they would not, and that the costs would, in that case, have been ordered to be paid by the trustee.

It is next said, that the *cestuis que trustent* have abandoned their lien by the frame of the suit, by which they do not seek to follow the trust money or to adopt the investment, and by their having obtained an order that the trustee should pay the money personally. But all that this amounts to is, that the parties have tried to enforce their remedy against the trustee personally. Such
 a proceeding

a proceeding does not operate as a destruction of the lien of the *cestuis que trustent* on the security on which the trust money has been invested, if he has been able to recover from the trustee personally.

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The case of *Groom v. Booth*(a) has been relied upon on the part of the solicitors. That, however, was not a case in which trust money had been advanced upon a security. The security was given to the trustee personally as an indemnity, and the Vice-Chancellor there says, "Was this transaction an investment of the trust monies on the security of the property in question? I think it was not. It was not an investment of the trust money at all." And in another part of the judgment, his Honor says, with reference to the application of the produce of the sale, in paying the costs of a petition in bankruptcy for a realization of the security, "Now, I do not see how that would be a misappropriation of the money, even if the transaction had been an investment of the trust money on the security of the mortgage; for if it was the necessary and legal course of proceeding to apply to the Court of Bankruptcy to realize the estate, it would not be a breach of trust for that Court to order the costs to be paid out of the fund. But it was simply an indemnity, and it was therefore right and just that the costs of the petition should be paid out of the trust fund, and it will be no breach of trust to make that application of a portion of it." All that his Honor meant by that was, that an application was necessary to be made to the Court of Bankruptcy for the purpose of realizing the security, and that the order must be obtained subject to the rule adopted in bankruptcy in such cases.

(a) 1 *Drew.* 548.

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A testatrix bequeathed the interest of long annuities to her sisters, and in case of one or both of their deaths before hers, gave "the whole of interest in long annuities" to her brother for life. At his death, half of the interest she gave to a daughter of the brother till she attained twenty-one, and "then to receive half the capital." Likewise the testatrix bequeathed to a son of her brother the other half:—*Held*, on the construction of the whole will, that the bequests to the niece and nephew were not contingent upon the sisters' deaths in the testatrix's lifetime.

BOOSEY v. GARDENER.

THIS was an appeal from the decision of the Master of the Rolls on a special case submitted to the Court to determine the construction of the will of *Ann Evans*, dated the 2nd of *March*, 1831, of which the following were the material portions:—"First, I will and bequest to my brother, *Samuel Boosey*, if living, the interest of my property in the three-and-a-half per cents. If not living at my decease, I will and bequest the interest of that property to my niece, *Elizabeth Stone* (my sister, *Mary Stone's*, daughter), for her natural life. In case of her leaving child or children, that property to be divided between them at her decease. I likewise will and bequest to my niece, *Elizabeth Perry* (my brother, *Samuel Boosey's*, daughter), 50*l.*, to be paid her 10*l.* per year for five years after the decease of my sister, *Sarah Fahy*, from the Long Annuities, or any other stock that my executors may thought proper to removed it to. I likewise will and bequest to my sister, *Sarah Fahy*, and my sister, *Mary Stone*, the interest of my property in the Long Annuities, jointly for their natural lives, to be paid them half-yearly as received. In case of one or both of their deaths before mine, I will and bequest the whole of interest in Long Annuities to my brother, *John Boosey*, for his natural life. At his death, half of the interest I will and bequest to my niece, *Ann Elizabeth Boosey*, my brother, *John Boosey's*, daughter, to help bring her up till she attain the age of twenty-one years, then to receive half the capital; I likewise leave her my watch and seals; likewise I will and bequest to my nephew, *Samuel John Boosey*, my brother, *John Boosey's*, son,

son, if not farther family, the other half; in case of further family, to be divided between them at the age of twenty-five years, not dividing the half I have left to my niece, *Ann Elizabeth Boosey*; it is my will that she receive the one-half. In case of my niece, *Elizabeth Stone*, leaving no child, that capital shall return to my brother, *John Boosey's*, children. I likewise leave my dear brother, *John Boosey*, and Mr. *John Gardener*, of 22, Queen Street, *Bryanstone Square*, my executors, beg their acceptance, of 10*l.* each for their trouble. After my death, if my executors think proper to remove the property from the Long Annuities to any other stock, I give them full power so to do."

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The testatrix died on the 24th of *January*, 1840.

Her only next of kin, living at her decease, were her two brothers, *Samuel Boosey* and *John Boosey*, and her two sisters, *Sarah Fahy* and *Mary Stone*.

One of the questions for the opinion of the Court was, whether, as neither of the testatrix's sisters, *Sarah Fahy* and *Mary Stone*, died in the testatrix's lifetime, the Long Annuities (except as to the respective life interests therein of *Sarah Fahy* and *Mary Stone*) were undisposed of by her will.

Mr. *Roundell Palmer* and Mr. *W. W. Cooper*, for *Amelia Elizabeth Boosey*, referred to *Key v. Key* (a); *Doutty v. Laver* (b); *Lethieullier v. Tracy* (c); *Pearson v. Simpson* (d); *Napper v. Sanders* (e); *Horton v. Whittaker* (f).

Mr.

(a) 4 De G. M. & G. 73.

(b) 14 Jur. 188.

(c) 3 Atk. 774.

(d) 15 Ves. 29.

(e) *Fearne, Cont. Rem.* 21.

(f) 1 T. R. 346.

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Mr. *Lloyd* and Mr. *C. Hall*, for the next of kin, argued in favour of intestacy.

Mr. *Hitchcock* and Mr. *Mackeson* appeared for other parties.

Mr. *R. Palmer* in reply.

Judgment reserved.

March. 27.

The LORD JUSTICE TURNER.

The sole question which we are called upon in this case to determine is, whether the interests of the Appellants *Amelia Elizabeth Boosey* and *Samuel John Boosey*, the children of *John Boosey*, in the Long Annuities disposed of by this will, are contingent upon the testatrix's sisters, *Sarah Fahy* and *Mary Stone*, or one of them, dying in her lifetime. Whether the disposition of the Long Annuities is contingent, so far as *John Boosey* himself is concerned, is not brought under our consideration.

It is not disputed that the disposition in question, if construed to depend upon the contingency referred to, would, so far as appears upon the face of the will, be merely capricious; but it was truly said that this Court, if it is satisfied that such was the intention of the testatrix, is not the less bound to carry it into effect because it may have been capricious. It is the privilege of testators to be capricious if they please; and it was well observed by Mr. *Hall*, that dispositions, apparently capricious, may in some cases have their foundation in circumstances unknown to the Court, but which might be sufficient, at all events in the opinion of the testator, to render the disposition reasonable. In cases of this nature,

nature, therefore, the Court must be guided by the words of the will; but it must look to the whole will, so far as it bears upon the subject, and not merely to any particular expression contained in it; and it must, as in other cases, be careful that the particular expressions of the will are applied only to the subjects to which they were intended to refer.

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In this case I am not prepared to say that if the question had related solely to the interest of *Amelia Elizabeth Boosey*, and had depended only on the disposition in her favour immediately following upon the disposition in favour of *John Boosey*, the interest of *Amelia Elizabeth Boosey* might not properly be held to have depended upon the contingency; but I find in the ulterior part of this will the following disposition, "Likewise, I will and bequest to my nephew, *Samuel John Boosey*, my brother, *John Boosey's*, son, if not further family, the other half."

This disposition cannot, I think, upon the sound construction of this will, and having regard to the authorities which were referred to, be held to be governed by the words of contingency so far as *Samuel John Boosey* is concerned; and if it is not so governed as to him, I think that neither can the disposition in favour of *Amelia Elizabeth Boosey* be so governed, for the two dispositions are connected together and form part of one scheme, and there is upon the face of the will an evident preference in favour of *Amelia Elizabeth Boosey*.

My opinion, therefore, is, that the declaration contained in this decree must be altered, and that it must be declared that the interests of *Amelia Elizabeth Boosey* and *Samuel John Boosey* did not depend upon the contingency

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tingency of the sisters, or one of them, surviving the testatrix; but this declaration, so far as *Samuel John Boosey* is concerned, must be without prejudice to any question as to the validity of the disposition in his favour in any other respect.

The LORD JUSTICE KNIGHT BRUCE concurred.

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 Dec. 8, 9, 10,
 20, 21.

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Before *The*
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Misrepresentations, to constitute sufficient grounds for setting aside a purchase, must be material, as being of such a nature as, if true, to add to the value, must not be evidently merely conjectural statements, and must be made without a belief in their truth or without reasonable grounds for such a belief.

THIS was an appeal from a decision of the Master of the Rolls. The case is reported below, in the 17th volume of *Mr. Beavan's Reports*, page 234. The facts appear sufficiently from that Report and the judgments.

Mr. Willcock, Mr. W. M. James, and Mr. W. H. Harrison, were for the Appellant.

Mr. Roundell Palmer, Mr. Kenyon, and Mr. Giffard, for the Respondents.

Mr. Willcock in reply.

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Where advertisements for the sale of shares in a mine had been issued containing unfounded statements, but the purchaser had not relied upon them, and had had opportunities of judging of their accuracy,—*Held*, that he was not entitled by reason of them to have the contract rescinded.

In suits to rescind contracts for fraud, particularly where the subject is of variable value, it is the duty of the Plaintiff to put forward his complaint at the earliest possible period.

The following cases were cited—*Harvey v. Young* (a); *Ekins v. Tresham* (b); *Lysney v. Selby* (c); *Pawson v. Watson* (d); *Pasley v. Freeman* (e); *Schneider v. Heath* (f); *Edwards v. M'Leay* (g); *Attwood v. Small* (h); *Cornfoot v. Fowke* (i); *Wilson v. Fuller* (k); *Wilde v. Gibson* (l); *Reynell v. Sprye* (m); *Gerhard v. Bates* (n); *Gordon v. Gordon* (o); *Budd v. Fairmaner* (p); *Barrows v. Lock* (q); *Bayly v. Merrel* (r); *Loundes v. Lane* (s); *Dyer v. Hargrave* (t); *Bree v. Holbech* (u); *Haycraft v. Creasy* (x); *Parkinson v. Lee* (y); *Legge v. Croker* (z); *Foster v. Charles* (aa); *Freeman v. Baker* (bb); *Wilson v. Short* (cc); and the following passages from the Digest and Codex:—"Ipse (Labeo) sic definiit dolum malum esse omnem calliditatem fallaciam machinationem, ad circumveniendum, fallendum, decipiendum alterum, adhibitam. Labeonis definitio vera est (dd)." "Fraudis interpretatio semper in jure civili, non ex eventu duntaxat, sed ex consilio quoque desideratur (ee)." "Dolum ex indiciis perspicuis probari convenit (ff)." "Quod venditor, ut commendet, dicit sic habendum, quasi neque dictum neque promissum est (gg)." Judgment reserved.

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| (a) <i>Yels.</i> 20. | (o) 3 <i>Swanst.</i> 400. |
| (b) 1 <i>Lev.</i> 102. | (p) 8 <i>Bing.</i> 52. |
| (c) 2 <i>Ld. Raym.</i> 1118; 1 <i>Salk.</i> 211; <i>S. C. nom. Riney v. Selby.</i> | (q) 10 <i>Ves.</i> 470. |
| (d) <i>Comp.</i> 785. | (r) <i>Cro. Jac.</i> 386. |
| (e) 3 <i>T. R.</i> 51. | (s) 2 <i>Cox.</i> 363. |
| (f) 3 <i>Campb.</i> 506. | (t) 10 <i>Ves.</i> 505. |
| (g) 2 <i>Swanst.</i> 287; <i>Sir G. Coop.</i> 308. | (u) <i>Doug.</i> 655. |
| (h) 6 <i>Cl. & Fin.</i> 232; <i>Younge,</i> 460. | (x) 2 <i>East,</i> 92. |
| (i) 6 <i>M. & W.</i> 358. | (y) 2 <i>East,</i> 314. |
| (k) 3 <i>Q. B.</i> 68. | (z) 1 <i>B. & B.</i> 506. |
| (l) 1 <i>H. of L. Ca.</i> 605; <i>Sir E. Sugden on Law of Prop.</i> 614. | (aa) 7 <i>Bing.</i> 106. |
| (m) 1 <i>De G. M. & G.</i> 691. | (bb) 5 <i>B. & Ad.</i> 797. |
| (n) 2 <i>Ell. & Bl.</i> 476. | (cc) 6 <i>Hare,</i> 366. |
| | (dd) <i>Dig. lib. iv. tit. iii. s. i.</i> |
| | (ee) <i>Dig. lib. i. tit. xvii. s. lxxix.</i> |
| | (ff) <i>Cod. lib. ii. tit. xxi. s. 6.</i> |
| | (gg) <i>Dig. lib. iv. tit. iii. s. xxxvii.</i> |

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The LORD JUSTICE KNIGHT BRUCE.

This cause (which, produced in the principality of *Wales*, is not without some marks of its domicil of origin) was instituted in the year 1851, for setting aside certain sales, made to the Plaintiff, and obtaining accordingly a return of his purchase-money, with interest; the ground of the relief prayed being certain alleged misrepresentations of fact, which he states to have been made to him by the Defendants, the vendors, or under their authority and direction. The Defendants, resisting the demand, put in answers not favourable to the Plaintiff's case, which were replied to, and much evidence, oral and documentary, was adduced on either side. The cause thus constructed, was heard at sufficient length before his Honor the Master of the Rolls, who, in *June* last, after time taken to consider of his judgment, dismissed the bill with costs. The appeal from this decision,—an appeal debated by six learned counsel during many days, not at less length nor with less minuteness before us than were bestowed on the matter at the Rolls,—we are now to dispose of.

It appears, that in the year 1850, the Defendants, having obtained a grant or lease from Lord *Powis*, dated the 20th of *August* in that year (by which the right of mining within a tract of mountain land, called *Craig y Mwyn*, in *Montgomeryshire*, containing veins of lead ore, the main or sole object of pursuit and attention, was demised to the Defendants for twenty-one years from the 24th of *June* 1850), proceeded to the formation of a Company for working under the grant, to consist of themselves and others, who might be induced to take shares in the undertaking. This plan having been carried into operation, various persons, including the Plaintiff, did take shares. The shares were 1,600 in the whole,
but

but many were retained by the Defendants. The Plaintiff, at different times, between the commencement of *October* 1850 and the end of *January* 1851, bought 719 shares, that is to say, 714 directly of the Defendants for considerable sums of money, and five of a person who had acquired them from the Defendants. These 719 shares the Plaintiff alleges that he was induced to purchase by means of untrue statement of facts materially bearing upon the condition and value of the property, which he says were made to him individually and particularly, and also as one of the public, by the Defendants and, under their authority, by Mr. *Bell Williams*, an agent of theirs,—made (the Plaintiff says) in part orally, but contained also (he asserts) in a Report of Mr. *Bell Williams*, which, in fact, was promulgated in *August* 1850,—another report of that gentleman which, in fact, was promulgated in *October* 1850,—and certain advertisements that, in fact, appeared in a periodical publication, called “*The Mining Journal*,” in the same *October* and *September* also of that year.

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And here I may pause for the purpose of mentioning that the Plaintiff is a barrister, who, called to the bar before the year 1850, was in that year between thirty and thirty-five years of age, and his letters of *December* 1850, as well as other circumstances in proof, show to my apprehension plainly that he is a person whose intelligence and capacity are above or certainly not below mediocrity, and that, throughout the years 1850 and 1851, he was (to use a familiar phrase) very well able to take care of himself. The Defendants (who inhabit the frontier of *England* and *North Wales*) call themselves or are called esquires, and have, I dare say, as good a title to that designation as the majority of those who use it.

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It appears that the Plaintiff, in *September* 1850, made one visit of inspection to the mine, and on the 1st of *November* following another (some of his shares having been taken after and some before that day), and, whether well informed or unlearned in geology, mineralogy or mining, it was through his own choice if he did not—but I think it a just inference from the evidence that he did—on each of those occasions fully inspect and fully examine the mine, so far as physically possible; and it must, on the evidence, as I consider, be taken that, on both occasions, he saw there whatever with or without the aid of lamp or candle was an object of sight. [After adverting to the evidence on the subject of this inspection, his Lordship said]—I am not surprised that the Master of the Rolls should not have been satisfied that the Plaintiff, in making any one of his purchases, relied upon any information beyond that which he derived by means merely of his own inspection of the mine. And I consider it a view of his case rather favourable than unjust to him to represent and treat the validity and success or the weakness and failure of his title to a decree as depending on these three questions :

First, in the statements or representations concerning the mine that were published or made by the Defendants and Mr. *Bell Williams*, or by any one or more of them, or in any one of those statements or representations, was there any untrue assertion material in its nature, that is to say, which, taken as true, added substantially to the value or promise of the mine, and was not evidently conjectural merely ?

In the second place, if so, was any such untrue assertion published or made without a belief in its truth by the person or persons publishing or making it ?

And

And thirdly, if not, was the belief entertained without fair or reasonable ground ?

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Before proceeding however, to the consideration of these questions it is necessary to exclude from them, and from the controversy altogether, every assertion (if there was any) which the visible state of the mine, at the time of either of the Plaintiff's two inspections of it contradicted. The Defendants, whether admitting or denying any misrepresentation, are entitled to the application and protection of the principles on which *Dyer v. Hargrave* (a) was decided by Sir W. Grant. It makes no difference in substance for the present purpose, at least in the Plaintiff's favour, that *Dyer v. Hargrave* was a case of specific performance and this a rescinding bill. I desire to be understood as at once giving my opinion against the Plaintiff with regard to every "object of sense" which on either visit to the mine he may, as an educated man of ordinary intelligence, having the use of his eyes, his mind on the alert and his interest awakened, be reasonably taken (whether much or little of a workman or a philosopher) to have observed ; and nothing that I shall say is to be received or interpreted as extending to any such matter.

Now, supposing the first of the three questions to be answered adversely to the Plaintiff, I need not say that his case wholly fails ; but, supposing it to be answered in his favour, I conceive that, if the other two ought to be answered in favour of the Defendants, the case of the Plaintiff also fails altogether ; and, unless various witnesses in the cause on the part of the Defendants ought to be considered as perjured or very greatly in error as to matters of alleged fact, the Plaintiff's

(a) 10 Ves. 505.

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tiff's case, viewed as I have just been mentioning, does fail entirely. [After a minute examination of the evidence, his Lordship said:]—As to the first, then, of the three questions, I acknowledge that I entertain doubt; but it is upon the Plaintiff that the burden of the proof rests. As to the second and third, however, I am satisfied that, upon the materials before the Court, his case ought to be treated as without foundation. I must therefore hold one of two things to be right—either that the bill should stand dismissed, or that there should be an oral examination of witnesses in open Court before ourselves. Between these two I have hesitated; but my opinion, ultimately formed, is, that the bill should stand dismissed—not because of the great (I had almost said, considering the nature, while not forgetting the domicile, of this cause, the prodigious) amount of the time of the Court of Chancery, that at the Rolls and here, has been consumed by the present litigation—but because the Plaintiff, if his alleged case or any substantial part of it is well founded in merits, can obtain redress by an action, in which he may recover just damages; and because the controversy is such in local origin, is such in kind, is dependent mainly on the credit of such witnesses, and is so likely to be usefully assisted by a special jury, (if not of *Montgomeryshire*) of *Shropshire*, by a view, and by the experience of a judge accustomed to circuit business, that, supposing the dispute one that ought not here and now to end, an action seems to me the course by which justice may most probably be attained by the Plaintiff, if he has not already attained it.

I think that the order dismissing the bill with costs must be affirmed; but I have no objection to add a declaration, not I believe asked at the Rolls, that the dismissal is without prejudice to an action. With regard

to

to the costs of the Appeal, I think that the Defendants should only take the deposit.

The LORD JUSTICE TURNER.

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This bill is filed for the purpose of rescinding two several purchases made by the Plaintiff from the Defendants of 250 and 464 shares in a Mining Company, formed for working some mines or supposed mines in a tract of land called *Craig y Mwyn*, and of having the purchase-money for the shares, and several sums of money paid for calls upon them, refunded by the Defendants to the Plaintiff.

The tract of land called *Craig y Mwyn* is of large extent, and is situate in a mineral district. It appears to have been worked by different persons at different times for many years anterior to the year 1843. In the month of *April* 1843 the Defendant *Bibby*, who was a general shopkeeper in the neighbourhood, obtained a licence to work it, and he associated with him, in the undertaking, the Defendant *Robert Broughton*, who was a surgeon. The Defendant, *R. N. Broughton*, who is a woolstapler, afterwards joined in the undertaking in the year 1845. The licence, originally granted to the Defendant *Bibby*, was for a year only, but it was renewed annually up to the year 1850, when a lease, dated the 20th of *August* 1850, was granted to all the Defendants for a term of twenty-one years, at a royalty of 1-10th, with the usual powers and subject to the usual covenants contained in mining leases. Upon the lease being granted, the Defendants determined to form a Company for carrying on the works, dividing the concern into 1,600 shares, on which they ultimately fixed the price of 8*l.* per share. The Company was formed on the 12th of *October* 1850, on which day the Plaintiff became the purchaser of the 250 shares, and he afterwards purchased the 464 shares early

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early in the following month of *November*. Several calls have been made upon the shares to the amount in the whole of 1*l.* 6*s.* per share. This bill, which was filed in *October* 1851, rests upon the ground that the Plaintiff was induced to purchase these shares by false and fraudulent representations, made by or by the authority of the Defendants; and the bill alleges that the Plaintiff first began to suspect the fraud which had been practised upon him in the month of *March* 1851, and that his suspicions were afterwards confirmed by inquiries made in the months of *April* and *May* in that year.

The representations impeached by the bill are, for the most part, contained in the following documents:— A report of *Bell Williams* (a surveyor who was employed by the Defendants to inspect the mines); dated the 10th of *August* 1850; an advertisement in the *Mining Journal* of the 31st of *August* 1850; another advertisement inserted weekly in the same journal from the 7th of *September* to the 5th of *October* 1850.; another report of *Bell Williams*, dated the 1st of *October* 1850, and a third advertisement in the *Mining Journal* of the 19th of *October* 1850.

To the report of the 10th of *August* 1850, it was in the first place objected that it purports to be made upon a view of the mine taken by *Bell Williams*, whereas the evidence shows that it was, for the most part, founded upon communications made to him by the Defendant *Bibby*; and if the report had been descriptive of the future prospects of the mine, I think there would have been some weight in this objection, for then it might perhaps have been justly said that the Plaintiff was entitled to trust, and did trust, to the competency and absence of bias of the person by whom those prospects were described; but this report seems to me to be descriptive

scriptive merely of things either past or present ; and if therefore it be true in fact, I do not see how it can be material from whom the description emanated. If it be untrue in fact, it is of course open to impeachment upon that ground, without reference to the question from whom the description contained in it proceeded. It was further objected to this report, that it speaks of things as then existing which clearly did not exist at the time,—that it refers to the present time what wholly belonged to the past ; and this observation was particularly applied to the description given by the report of the Level, No. 1. It was said that the word “yielding” in this description imported “then yielding” ; but credit must be given to persons who purchase property upon the faith of written statements for something more than a mere cursory glance at the statements, on the faith of which they purchase ; and a very slight examination of this statement proves that it could not be intended to refer to what was then going on.

[His Lordship adverted to portions of the document leading to this conclusion, and then compared its statements with various portions of the evidence ; and with respect to the statements as to Level No. 1, his Lordship expressed his opinion that these were borne out by the evidence. His Lordship then proceeded as follows :]—There is, however, a part of the description of this level which certainly is not borne out by the evidence. It is that part which describes the lode cut through and showing the body of solid ore to be resting on the vein, three feet wide, largely intermixed with lumps of ore and calamine, and continuing to maintain the same width and characteristics to the extent of the present workings, being seventeen yards further. I find no evidence to warrant this statement. That there were lumps of ore in this level is, I think, proved ; but I see no proof of there having been any calamine, and no proof of the lode continuing

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continuing to maintain the same width and characteristics for the seventeen yards which are mentioned. *Bell Williams* indeed, in his evidence, states that the driving of the seventeen yards had not laid open or exposed any part of the vein, and that his conclusion as to the lode continuing to maintain the same width and characteristics for that distance was founded only on the fair wall which the side of the vein presented. But to say that these statements in the report were not well founded is one thing: to say that the Plaintiff was deceived by those statements, or was induced by them to purchase these shares, is another thing. Looking at the character which the Plaintiff gives of himself, and which is given of him by his witnesses, I think it impossible to believe that he could have been at all induced to purchase these shares by the statement of there being lumps of calamine in this level. And, with respect to the lode continuing to maintain the same width and characteristics, the Plaintiff was twice at the mine, once before he purchased any shares, and the second time in the interval between his two purchases; and, however ignorant he may be of mining, he must at least have been capable of seeing whether the vein had or had not been laid open behind the point where the solid ore was presented to his view. If it had, he must have known what were its characteristics. If (as was the fact) it had not, he must have known that this statement could only be matter of speculation, and not of certainty.

[After adverting to the part of the report relating to the Level, No. 2, and to the ore found upon the surface, which his Lordship considered also to be abundantly proved, his Lordship continued:—I have gone thus fully through this report, because I consider it to be the keystone of the case. If these parties had contemplated fraud, I think distinct *indicia* of it would have appeared in this report. Looking at the evidence before

before us, I do not find any such *indicia*. My examination of the report of the evidence has led me to the conclusion at which the mining engineers examined on the part of the Defendant have arrived—that this report was a *bonâ fide* report, and, with the exception of the passage to which I have adverted, a fair report. I do not think that there was any fraudulent intention in the insertion of that passage, but whether there was or not, I am of opinion that under the circumstances of this case the Plaintiff cannot found any title to relief upon the ground of that statement.

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The next document is the advertisement of the 31st of *August* 1850. This advertisement is a mere summary of the report, and brings forward no new statement, except the statement that there are already thirty tons of ore at the surface. It appears, however, by the evidence, that this ore was then in bulk, and that the quantity of lead therefore could only be arrived at by estimate, and the Plaintiff himself was afterwards present at a meeting on the 12th of *October* 1850, at which the quantity of ore on the bank was discussed. The Defendant *Bibby* desired that it should be stated at a low rather than a high estimate; and it was set down accordingly at twenty tons, the understanding of all parties being, that it was only from guess that the quantity could be spoken of. It is hardly necessary to say, that this evidence wholly displaces any title in the Plaintiff to relief upon the ground of this statement.

The documents next in order are the advertisements in the *Mining Journal* from the 7th of *September* to the 5th of *October*, 1850. These advertisements contain statements which, in my judgment, are not supported by the evidence, and ought not to have been made. I refer particularly to the statements as to three lead bearing veins

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veins being then worked, and as to the fifty tons of ore on the bank. If therefore these documents had been the only documents, and the Plaintiff had relied upon these documents alone, I am very much disposed to think he would have been entitled to the relief prayed by this bill. But how does the case really stand in this respect? The Plaintiff, before he took any shares, had before him not merely these advertisements, but also *Bell Williams'* report (to which I have already referred), and his further report, to which I shall next refer; and he states in his evidence, that it was upon these reports he mainly relied. He was fully competent to judge of the difference between the statements in the reports and in these advertisements, and he relies upon the former in preference to the latter. There is also the conversation as to the ore on the bank, to which I have already adverted. Again, he himself admits in his evidence, that on both occasions when he visited the mines before he purchased any shares, and in the interval between his purchases he went through the Levels Nos. 3 and 4, where the lead bearing veins described in these advertisements as being then worked were intersected, and it is clear from the evidence of *Edward Hampson*, that he was no inattentive observer of what was going on.

These facts taken alone would, I think, be sufficient to show, that the Plaintiff did not rely upon the advertisements. But the case by no means rests here. On the 1st of *November*, 1850, we find him in conversation with *Evans*, who, being then about to purchase shares, asks his opinion as to the mine, and his answer is, that, judging from its appearance, there was a strong probability of its proving a profitable mine. And again, later in the same month, he visits at Mr. *Evans's* house, exhibits the map, and points out and explains the levels of the mine, and, being asked his opinion as to whether there

was

was plenty of ore, replies that he has no doubt there was abundance, but that his only fear was, lest the value of the lead should be depreciated. Putting together these facts and other facts which appear in the case, much as I disapprove these advertisements, I cannot justify to myself the belief that the Plaintiff in any manner relied or acted upon them. [After commenting on the other representations made, and the evidence as to their accuracy, and saying that his Lordship did not consider the case carried further by them, his Lordship said:]—There are, however, one or two other points in the case to which I will shortly refer. I think it clear upon the evidence, that these Defendants, if they had thought proper to do so, might have sold many more shares in the mine, and sold them at a premium; and that the fact of their not having done so is strong evidence of *bona fides* on their part. I think, also, that in cases of alleged fraud, and particularly in cases of fraud affecting property of this nature, it is the duty of any one complaining of the fraud to put forward his complaint at the earliest possible period.

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Now, the first sale of the lead of the Company took place early in *December*, 1850. The quantity then sold certainly did not correspond with the prospects held out by the reports and advertisements. Yet the Plaintiff made no complaint; and, on the contrary, at the meeting in *January*, refused to sell any shares even at a considerable premium. If the relief prayed by this bill be granted, how are the Defendants to be compensated for the loss which they may have sustained by not having been placed in a position to sell to other persons who might have been well content to abide the risk, from which the Plaintiff desires to shrink? I think further, that it sufficiently appears that the Plaintiff purchased these shares with the full knowledge that he was embarking

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embarking in a speculative concern, and the intention to do so. In proof of this I may refer, amongst other evidence, to the Plaintiff's letters of the 1st and 2nd April 1851. The true state of the case seems to me to be, that the Plaintiff was incited by the prospect of large gains, and acted too hastily, perhaps, on his own judgment.

And, finally, I think that although it is the undoubted duty of this Court to relieve persons who have been deceived by false representations, it is equally the duty of this Court to be careful that, in its anxiety to correct frauds, it does not enable persons who have joined with others in speculations to convert their speculations into certainties at the expense of those with whom they have joined. This, in my opinion, would be the effect of giving the Plaintiff the relief which he asks, and, I think, therefore, that this bill has been properly dismissed.

I have felt some doubt about the costs; but the case put forward by the Plaintiff is one of fraud, and I think a very strong case ought to be made out to warrant a Court of Appeal in interfering with the discretion of a judge in the matter of costs. Upon the whole, I do not feel strongly enough to propose any alteration of the Decree in this respect. I think the justice of the case will be met by dismissing the Appeal upon the terms which have been suggested. It must be dismissed accordingly.

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March 21, 22,
23, 30.

THIS was an Appeal from the decision of Vice-Chancellor *Kindersley*, reported in the 2nd Volume of *Mr. Drewry's Reports*, page 102, where the facts are stated from the judgment of the Vice-Chancellor. The following summary of them has been transposed to this place from the judgment of the Lord Justice *Turner*.

Before The
LORDS JUSTICES.

Two bankers carried on business under articles of partnership, providing that if at the end of five years, for which the partnership was to continue, either partner should wish to carry on the business, and should not take the share of the other at a valuation, the assets should be realized, the debts paid, and the surplus divided. Simultaneously with the execution of the articles a surety for one of the partners entered into a bond to indemnify the other against all loss in respect of the partnership. The business

In the year 1833 *Hylton Jolliffe*, the Defendant *Currie*, and *Charles Cotton Butterfield*, established a bank at *Petersfield*. They entered into articles of partnership on the formation of the bank, and carried on the business under those articles and other articles entered into in the year 1839 down to the 20th of August 1842. *Butterfield* was the managing partner of the bank, and, upon the formation of the partnership, a bond was given by him and by *John Lipscomb*, as his surety, to indemnify the other partners against any misconduct on his part.

On the 20th of August 1842 the partnership of *Jolliffe*, *Currie* and *Butterfield* was dissolved, and a new partnership was formed between *Currie* and *Butterfield*. New articles of partnership were entered into between these two parties. They were dated the 20th of August 1842, were made between *Currie* of the one part, and *Butterfield*

of the bank was continued by the firm for more than a year after the expiration of the five years:—*Held*,

1. That by this continuation the surety was discharged.
2. That whether that circumstance would afford a defence to an action on the bond or not, a Court of Equity would restrain the obligee from proceeding in such an action.

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field of the other part, and contained, amongst other provisions not necessary to be stated, two clauses (the 16th and 17th) in these terms:—That in case either of them the said *James Currie* and *Charles Cotton Butterfield* should die before the expiration of the term of partnership, or in case at the expiration or other sooner determination of the partnership either of them the said *James Currie* and *Charles Cotton Butterfield* should retire from the banking business, and the other of them should be desirous of carrying on the same, then the share and interest of the partner so dying or retiring from the business of and in the capital, stock, credits and effects of the partnership might be taken by the other of the said partners at the value which should have been fixed upon the same in the last preceding half-yearly account of the partnership; and as and from the said period of taking such account the interest and liability in respect of profits and loss of such partner so dying or retiring in respect of the partnership should cease, and the amount of the value so fixed as aforesaid of his share and interest should be paid to him, or his executors or administrators, by the other of them within six calendar months after the last-mentioned period, with interest for the same from that period after the rate of 5*l.* per cent. per annum; and the partner, his executors or administrators, to whom such payments should be made should thereupon make and execute such acts, deeds, assignments and assurances as might be required for effectually vesting the share and interest so purchased as aforesaid in the partner purchasing such share, and for enabling him and them to collect, get in and receive the monies, credits and effects due, owing or belonging to the partnership in respect of such share and interest; and the partner purchasing the share aforesaid should execute and deliver to the other the deceased or retiring partner,

his

his executors and administrators, a bond or bonds in a sufficient penalty for indemnifying the obligee or obligees in the bond or bonds, his or their executors or administrators, against the debts and demands due and owing by or from the partnership; such assignment and bond to be prepared by and at the expense of the purchasing partner. That if at the expiration of the term of the partnership, or at any sooner determination thereof, either of them the said *James Currie* and *Charles Catton Butterfield* should be desirous of continuing the business, and should refuse or neglect to purchase the share of the other of them quitting the business or dying, and pay the value thereof in manner aforesaid, then a general rest or account should be made and taken of the partnership stock, credits and effects, and the stock and effects should be converted into money, and the credits collected in, and out of the money to arise from the stock, credits and effects all the debts and demands justly due and owing by or from the partnership should be in the first place fully paid and satisfied; and the surplus or residue of the monies should be forthwith divided between the said partners, their executors or administrators, according to their respective rights and interests.

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Upon the formation of this new partnership a joint and several bond of even date with the articles was also given by *Butterfield* and *Lipscomb*, as his surety, to *Currie*. The condition of this bond contained the following recitals:—

“Whereas by articles of agreement indented bearing even date with the above-written obligation, and made between the said *James Currie*, of the one part, and the above *Charles Cotton Butterfield*, of the other part, each of them the said *James Currie* and *Charles Cotton Butterfield*,

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field, for himself, his heirs, executors and administrators, hath covenanted and agreed with the other of them his executors and administrators mutually and reciprocally, in manner therein mentioned, and hereinafter in part recited, that is to say, that the said *James Currie* and *Charles Cotton Butterfield* shall be and continue partners together in the business of bankers for the full term of five years to be computed from the day of the date of the now reciting indenture and of the above-written obligation, and that the said business shall be carried on, under the firm of *Butterfield & Co.*, in the messuage or dwelling-house in which the same is now carried on, situate at *Petersfield* aforesaid, or at such other place or places as the said partners shall mutually agree upon for that purpose, to be carried on with such capital to be advanced, in such shares, and with such participation of profits, as in the said articles mentioned, and which said articles of agreement contain various covenants and clauses for regulating the conduct of the said partnership business and other matters relating thereto. And whereas the said *James Currie* consented to become a partner in the said business at the instance and request of the said *Charles Cotton Butterfield* and *John Lipscomb*, and under an agreement on the part of the said *Charles Cotton Butterfield* and of the said *John Lipscomb*, as the surety of the said *Charles Cotton Butterfield*, to indemnify the said *James Currie*, his heirs, executors and administrators, in manner hereinafter expressed." The condition itself was thus expressed:—"If the said *Charles Cotton Butterfield* and *John Lipscomb*, or one of them, their or one of their heirs, executors or administrators, do and shall with and out of their or either of their or any of their proper monies from time to time, and at all times hereafter keep harmless and indemnified the said *James Currie*, his heirs, executors and administrators, from and against all accounts, reckonings, claims and demands, actions,

actions, suits and other proceedings, and all sum and sums of money, costs, losses, damages and expenses to which he or they or any of them shall be subject or liable by reason or in consequence of any breach, non-observance or non-performance by the said *Charles Cotton Butterfield*, his executors or administrators, of all or any of the covenants, stipulations and agreements expressed and contained in the said recited articles of agreement on the part of the said *Charles Cotton Butterfield*, his executors or administrators, to be observed or performed, or by reason or in consequence of the bankruptcy or insolvency of any of the correspondents, customers or debtors of the said partnership, the infidelity, default or neglect of any of the clerks, agents or servants of the said partnership, or by reason or in consequence of any act, matter or thing in anywise relating thereto respectively, or any other matter or thing whatsoever in anywise relating to the said partnership, or to the concerns thereof and arising without the act or default of the said *James Currie*."

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The partnership between *Currie* and *Butterfield* expired by effluxion of time on the 20th of *August* 1847. The business of the bank was not then wound up, but was carried on (whether for the purpose of winding up was one of the questions in the cause) up to the 3rd of *April* 1849, when it was dissolved by notice in the *Gazette*. It did not appear that any arrangement as to the assets or debts of the firm was made between *Currie* and *Lipscombe* on the occasion of this dissolution. The business, however, was not then wound up. It was carried on by *Butterfield* alone until sometime in the month of *July* 1849, when he absconded and became bankrupt. In the meantime *Lipscombe* had died. He died in the month of *October* 1848, and the Plaintiffs were his executors. After *Butterfield* had absconded demands were made

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upon *Currie* in respect of debts or liabilities of the partnership of *Currie & Butterfield*, which were contracted or subsisting during the continuance of that partnership from *August* 1842 to 1847. He satisfied those demands and brought an action at law upon the bond of indemnity against the executors of *Lipscombe*, who were the Plaintiffs. They thereupon filed this bill to have the bond delivered up to be cancelled and for an injunction to restrain the proceedings at law, insisting, partly, that *Lipscombe* was improperly induced by *Currie* to enter into the bond, and partly, that *Lipscombe* and his estate had been discharged from all liability upon the bond by the conduct and dealings of *Currie*. The case was argued before the Vice-Chancellor, mainly on the first of these grounds, and his Honor dismissed the bill, being of opinion that the Plaintiffs were not entitled to relief upon that ground.

The Plaintiffs appealed from the decision.

Mr. *Bacon* and Mr. *Giffard*, in support of the Appeal.

Mr. *Lipscombe* was altogether without legal assistance upon the occasion of entering into the bond. That instrument was of a most unusual kind, making him liable not only for Mr. *Butterfield's* misconduct in the business, but for all losses. As Mr. *Currie* was a solicitor and prepared the bond, the burden is upon him of showing that he explained to Mr. *Lipscombe* the effect of such a contract. This he has not proved. Secondly, if the bond can be sustained the surety was discharged by the course subsequently taken. The agreement was to indemnify Mr. *Currie* against all losses in the business up to *August* 1847, the period fixed for the expiration of the partnership. It was the duty of Mr. *Currie* to have at that time closed the concern. Debtors then solvent may have become insolvent since, and whether they did or
 not

not the surety is not bound under any circumstances, other than those, under which he contracted to be bound. They referred to *Watson v. Allcock* (a); *Bonar v. Macdonald* (b); *Railton v. Matthews* (c); and *Ex parte Kendall* (d).

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The LORD JUSTICE KNIGHT BRUCE.

The first question is, whether in the month of July 1847 Mr. *Lipscombe* was, in law and equity, bound by the bond, according to its purport and terms. I am of opinion (as I believe my learned brother to be also) that Mr. *Currie* did not stand in such a relation to *Lipscombe* as that Mr. *Currie* is under the burden of supporting the bond by doing more than proving by admission or otherwise the execution of the bond by the obligor. That being done, the burden is, in my opinion, upon the Plaintiffs to show that there are equitable circumstances in the Plaintiffs' favour against the bond considered without reference to subsequent facts. We are of opinion that they have not proved such a case, and that the just result of the evidence is this:—that *Lipscombe* must be taken to have executed the bond with the intention of binding himself by it according to its purport and tenor. Therefore the counsel for Mr. *Currie* may argue their case on the basis, that, in July 1847, *Lipscombe* was bound by the terms and tenor of the bond.

The LORD JUSTICE TURNER.

To establish the case relied upon by the Plaintiffs for relief from the bond, it is incumbent upon them to show that *Currie* was the solicitor of *Lipscombe* in the matter. At present there is no proof that such was the case. That *Currie* acted as the solicitor of the bank in preparing

(a) 4 De G. Mac. & G. 242.

(c) 10 Cl. & Fin. 934.

(b) 3 H. of L. Ca. 226.

(d) 17 Ves. 514.

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paring the bond does not establish the fact that he was acting as solicitor for *Lipscombe*. *Lipscombe*, moreover, lived more than five years after his execution of the bond, and never questioned it. The Plaintiffs have not made out a case for being relieved from the bond upon the circumstances attending its execution.

Mr. *Rolt*, Mr. *Elmsley* and Mr. *Burdon* for the Defendant.

The novelty of the question remaining to be discussed constitutes its only difficulty. If the proposition contended for could be supported, it would have frequently been advanced, for instance, in the common case of a partnership continuing after the death of one partner. There is no evidence whatever of time having been given to any debtor to the concern, or of any additional liability having been thrown on the surety. Of course he is only liable for losses up to the day in 1847 when the partnership terminated; but why should this liability be affected by the collateral fact of the concern being carried on, so far as was necessary for winding it up? No other course was practicable; the doors could not be closed, nor was any unusual course pursued or anything done beyond what must have been in contemplation when the bond was executed. The 17th clause of the partnership articles must be read in conjunction with the 16th. Moreover, Mr. *Lipscombe* knew that this was done in 1847, and made no objection.

They cited *Howell v. Jones* (a), and *The Bank of Scotland v. Christie* (b).

On the question of costs, they referred to *Wilde v. Gibson*

(a) 1 Cr. Mee. & Ros. 97.

(b) 8 Cl. & Fin. 214.

Gibson (a); *Archbold v. Commissioners of Charitable Bequests (b)*; *Glascott v. Lang (c)*, and *Price v. Ber-
rington (d)*; and contended that as the bill alleged a case
of fraud which had not been sustained, the Plaintiffs
must pay the costs.

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Mr. *Bacon* in reply referred to *Hewitt v. Loose-
more (e)*.

Judgment reserved.

The LORD JUSTICE KNIGHT BRUCE.

March 30.

A small country town in *Hampshire*, which, at least
since the Reform Act, has returned but one represen-
tative to the House of Commons, happened to possess
also but one bank, a bank unluckily conducted upon
opposition principles, that is to say principles unfavour-
able to what, in the language of those who deal in mem-
bers of Parliament, is called, I believe, the old influence.
And this bank was supposed, whether regularly or ir-
regularly, whether by means as to which

“ Più è il tacer che 'l ragionare, onesto,”

or otherwise to disturb and endanger that influence so
much that the gentleman by whom the influence was at
or soon after the time of passing the act impersonated,
and an active and intelligent *London* solicitor (in his Par-
liamentary and, no doubt, his general confidence), appear
to have thought that an additional bank, a bank having
more correct views of the public interest, might be bene-
ficially set up in the borough; a plan which would, of
course relieve the free and independent inhabitants from
the

(c) 1 *H. of L. Ca.* 605.

(d) 3 *Mac. & Gor.* 486.

(b) 2 *H. of L. Ca.* 459.

(e) 9 *Hare*, 449.

(c) 2 *Phil.* 310.

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the necessity of resorting for lawful accommodation to the existing establishment. The plan was resolved on, but as neither of the gentlemen could or would be the resident manager, and it seemed necessary to have a sound man in that capacity, they looked about and found a young farmer of the place whose opinions upon the theory and practice of government were suitable, and to his great pleasure, as well as surprise, no doubt, turned him into a banker and their partner; a choice additionally recommended by the fact that his wife was the niece and adopted daughter of an elder agriculturist well to pass in the world who, being also a right-minded politician, might fill the character of surety for the other rustic. And surety accordingly the senior agriculturist became, not once but twice, once in 1839 at the original launch of the bank, when consisting of the three; and again when, upon the retirement of the client or chief, it became composed of the solicitor and the younger farmer alone, which happened in 1842. The suretyship was effected by bonds, of course with conditions more or less apt annexed.

From the later bond, it is the object of this suit, instituted by the executors of the surety, to be relieved, for the earlier instrument is unimportant, except as matter of narrative and evidence. The other, the important one, is thus. The bond is dated the 20th of *August* 1842, and is in a penalty of 10,000*l.*, the joint and several obligors being Mr. *Lipscombe* (the elder farmer) and Mr. *Butterfield* (the young one), the obligee being the *London* solicitor, Mr. *Currie*. The condition runs thus—[His Lordship read it as set out, ante, p. 143.]

Now this instrument having been put in suit by Mr. *Currie*, the present bill seeks not only the proper accounts to ascertain the amount of liability (if any), but also

also absolute and unconditional relief from the instrument on more than one alleged ground of objection.

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The most, if not the only, important question in the cause, however, is, whether upon or after the termination (by lapse of time on the 19th or 20th of *August* 1847) of the partnership constituted in 1842, to which the bond in dispute or its condition relates, the Plaintiff's testator Mr. *Lipscombe* became equitably discharged from the bond, discharged I mean by conduct on the part of the Defendant Mr. *Currie*, subsequent to *July* 1847, independently of pecuniary satisfaction, that is to say whether there was pecuniary satisfaction or not: a question as to which it must be borne in mind that the fact that Mr. *Lipscombe* became an obligor in the bond in the character of surety for Mr. *Butterfield* was necessarily known contemporaneously to Mr. *Currie*, the obligee, whose duty accordingly, in the events that happened, it became, as between him and Mr. *Lipscombe*, to proceed in a particular manner after the 19th or 20th of *August* 1847. This was the duty of Mr. *Currie*, if intending to make, after that 20th of *August*, any demand upon Mr. *Lipscombe* under the bond, under which, in fact, no demand was on that day, or had previously been, or was afterwards made before the bankruptcy of *Butterfield*, nor indeed does it appear that at any time after *Lipscombe's* execution of it any notification or communication respecting it was in any sense or manner made to him or his executors before that bankruptcy. In what particular manner, however, was it thus the duty of Mr. *Currie* to proceed? I apprehend that he was bound not to embark or join in embarking the joint estate of the firm as it stood in 1847, at the end of the partnership formed in 1842, in any new partnership or adventure, but to cause it to be, with all reasonable despatch, collected, realized and applied in discharging the debts and liabilities of the

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the firm as they stood on the 20th of *August* 1847, so far as necessary for that purpose. I say so because neither the 16th nor the 17th clause of the articles of 1842 was pursued or acted upon. This course, however, was not taken, but instead Mr. *Currie* agreed with Mr. *Butterfield* to renew or continue, and did accordingly renew or continue their partnership, as from the end of the term of five years, which expired, as I have said, on the 19th or 20th of *August* 1847. From that time accordingly their business of bankers was continued under the same style and in the same manner as before until they finally dissolved their connection in business on the 3rd of *April* 1849, from which time until the bankruptcy of Mr. *Butterfield*, in *July* of the same year, he continued to carry on the business on his sole account.

Now at the termination, by lapse of time, in *August* 1847 of the partnership formed in 1842, it is quite clear that there was joint estate of that partnership—I mean joint estate of substantial amount and value, comprising and perhaps chiefly consisting of debts to a considerable amount then due to it. This joint estate was at that time, of course, in the possession of the two partners, subject only to the necessary qualification of the word “possession,” when applied to debts. And whether the partnership was then solvent or not solvent—whether Mr. *Butterfield* was then solvent or not solvent—it must be considered that Mr. *Currie* at least was then solvent. Nor probably has he ever been otherwise. But if the partnership was at that time insolvent it was not so avowedly apparently or visibly. There is not the least reason to believe that in the year 1842, or at any time between that year and the dissolution of *April* 1849, the partnership for the time being professed or represented itself to be or was considered by the world as insolvent. Nor in truth, upon the face of their books and accounts,

WAS

was the partnership formed in 1842 otherwise than solvent at its termination in 1847. If, in any sense or for any purpose, it was in truth then insolvent, it was, I apprehend, only so in respect and by reason that some of the debts then due to it have (whether then recoverable or not then recoverable) not been recovered. In this state of things, by means of the arrangement already mentioned of 1847, all the joint estate of the partnership formed in 1842, which existed at its termination in 1847, passed into and became the property of the renewed partnership formed or commencing in *August* 1847, and was dealt with accordingly; the business, I repeat, having been carried on until the early part of *April* 1849.

It is said that this was only for the purpose of winding up the partnership formed in 1842. But, though I do not mean to impute insincerity to any person who has so asserted, I must say that my view of the case is not so. The banking business appears to me plainly upon the evidence to have been carried on from the 19th or 20th of *August* 1847 until the final dissolution in 1849, just as it had been in the previous part of 1847, and earlier. All this, in my opinion, was unjustifiable as against Mr. *Lipscombe*, unless upon the hypothesis of his liability under the bond having ceased.

But it is said that *Lipscombe*, who lived hard by, knew of the banking business being continued by Mr. *Currie* and Mr. *Butterfield* after the 20th of *August* 1847, and did not object to it. That may be, or is so. It does not however appear that he was aware of the terms, plan or principles on which they were proceeding. He had no right to object to their being bankers in partnership together after that day, and may well have supposed that Mr. *Currie* either was acting regularly and rightfully, or had no intention of making a claim against him on the bond. And indeed as I have said no claim was in fact
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made before *July* 1849, although his death happened in *October* 1848.

Mr. *Currie* I think, by thus acting, in effect discharged *Lipscombe* in equity from the bond. But, assuming that at the time of his decease he was not discharged, still I do not see how Mr. *Currie's* course of acting in *April* 1849 can be justified against the executors. For neither then was the 16th or 17th clause of the articles acted on or attended to; and the joint estate, at that time, not inconsiderable, was left to the disposition or management of *Butterfield*, who continued the business in every sense alone.

It has been argued for Mr. *Currie*, that the defence arising from his conduct after *July* 1847 is available to the executors at law if founded in truth and justice; but of this if I were sure (which I am not), I should still hold that there is a jurisdiction here fit, in the circumstances of the case, to be exercised by us.

It has also been contended, that the question of the discharge of *Lipscombe*, by reason of Mr. *Currie's* conduct after *July* 1847, (independently of payment,) has not been raised by the bill and is not cognizable in this suit. That contention, however, I consider unfounded. But as it was possible that the scope of the bill might have been misapprehended, we thought it right, during the hearing, to offer to Mr. *Currie* the opportunity of adducing further evidence, including an oral examination of himself before us, of which opportunity his counsel declined to avail themselves, as believing, no doubt, that all evidence in support of his case, capable of being usefully resorted to, was already before the Court.

I wish to add, that though all that I have hitherto
said

said has been upon the supposition of the Plaintiffs' failure and inability to establish a case of satisfaction of the bond by actual payment, I am very far indeed from being persuaded of that failure and that inability. On the contrary, my impression from the materials before the Court (though I do not bind myself upon the point) is, that the amount of the sums received after the 20th of August 1847 by Messrs. *Currie & Butterfield*, in their capacity of copartners under the respective copartnerships of 1842 and 1847, which (as between them and Mr. *Lipscombe* and his estate) were, at least in equity, of right applicable, and ought, at least in equity, to have been applied by Messrs. *Currie & Butterfield* in paying off and discharging the liability (if any) of Mr. *Lipscombe* and his estate under the bond, was sufficient, or more than sufficient, to pay off and discharge that liability, if liability there was.

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All that I have said has been also upon the assumption, against the Plaintiffs, that they have not proved enough to show that Mr. *Lipscombe* was not, in July 1847 equitably, as well as legally, bound by the terms of the condition annexed to the bond in dispute, according to the actual tenor of that condition. An opinion to this effect was, indeed, expressed by my learned brother as well as myself before hearing Mr. *Currie's* counsel. It is not necessary to say whether subsequent reading and consideration have, so far as relates to myself, strengthened, or otherwise affected, that impression. For, whether it was right or wrong, correct or incorrect, the litigation, as I conceive, ought to be and must be, in all respects, decided in the same way. Mr. *Currie*, in June 1849, sent to Mr. *Butterfield* a lawyer's bill, amounting to 33*l.* and a fraction,—a bill chiefly or solely for the preparation of the bond and articles of 1842. It was accompanied

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accompanied by a letter to him from Mr. *Currie*, dated the 16th of *June*, 1849, which was in these terms :—

“ *Lincoln’s Inn Fields,*
 “ 16th *June* 1849.

“ Dear *Butterfield*,

“ In looking over our accounts I see we have a demand upon your bank, and I send you a copy of it. Will you settle it? I shall be glad to know how you have got on since our appearance in the *Gazette*, and we ought to exchange letters of mutual release.

“ Yours faithfully,
 “ *James Currie.*”

And my conclusion upon the whole matter is, that Mr. *Currie*, in writing this letter, and making as he did no demand under the bond before the bankruptcy of *July* 1849, took a more accurate view of his position than when he brought the action which produced this suit, and that the injunction against that action must be made perpetual, and the bond be delivered up to the Plaintiffs to be cancelled, they neither receiving nor paying any costs of any part of the litigation from the beginning, but if they have made a deposit taking it back.

The LORD JUSTICE TURNER, after stating the facts of the case, said—

The question, which we reserved for judgment, and which we have now to determine, is, whether *Lipscombe* and his estate have been discharged from liability upon this bond by the conduct and dealings of *Currie*. In determining questions as to the continuing liabilities of sureties, the first point to be considered, as I apprehend, must be what were the relative rights and obligations of the party in whose favour and of the party for whose benefit the contract of suretyship was entered into ; for
 sureties,

sureties, when they contract their liabilities, must necessarily look to those rights and obligations. They lie at the root of and form the inducement and foundation of the contract. When a man becomes surety for the debt of another, he looks to the power of the creditor to enforce payment from the debtor, and to the obligation upon the debtor to pay, and it is not less so in other cases. We must consider, therefore, in the first place what were the rights and obligations of *Currie* and *Butterfield* under the articles of partnership between them. It is not material for the present purpose what the rights and obligations were during the continuance of the partnership, but it is most important to see how they stood at the expiration of it.

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This partnership was for a limited period of five years. The articles are silent as to what was to be done at the expiration of the five years, except so far as the 16th and 17th clauses extend, and it was argued, and I think justly, that those clauses do not reach beyond the case of one party desiring to retire from and the other to continue the business; but, assuming it to be so, does it not follow that the law steps in and supplies the contract, and that the concern was to be wound up? I apprehend that it does.

It was said, however, that these 16th and 17th clauses, by providing for what was to be done, if either party desired to retire, import that the business was to continue if neither party so desired, and that *Lipscombe* having been cognizant of the articles must be bound by the inference thus to be deduced from them. But this argument goes much too far. The utmost extent to which it can reasonably be carried, seems to me to be, that the articles left the parties at liberty (as indeed they must in any event have been) to agree that the business should
be

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be carried on. In the absence of such an agreement my clear opinion is, that this business ought to have been wound up at the expiration of the time limited by the articles for the duration of the partnership.

Assuming then, that the partnership between *Currie* and *Butterfield* ought, in the absence of agreement between them, to have been wound up at the expiration of the term limited by the articles, we have next to consider whether it was competent to *Currie* to agree to its continuance, without the consent of *Lipscombe*, and yet to hold *Lipscombe* liable upon the bond. I am of opinion that it was not.

The position of principal and surety I take to be this. The surety has the right to satisfy the obligation by which he is bound and, upon satisfying it, to stand in the place of the party to whom he is bound against the party for whose benefit he has incurred the obligation. Upon the expiration of this partnership, therefore, *Lipscombe* had the right, if he thought fit to do so, to satisfy the debts and liabilities of the partnership, and upon satisfying them to stand in *Currie's* case as to the winding up the business. Upon *Currie* being satisfied, his rights in the assets of the partnership would become the rights of *Lipscombe*. It would be for *Lipscombe*, and not for *Currie*, to judge, in conjunction with *Butterfield*, how the assets of the partnership should be dealt with, and the debts due to it got in, what debtors should be sued, with which of them arrangements should be made, in what order and course the debts and liabilities of the partnership should be satisfied. Was it then competent to *Currie*, consistently with the existence of this right in *Lipscombe*, to agree with *Butterfield* without the consent of *Lipscombe*, that this business should be carried on. I am of opinion that it was not. The effect of such an agreement

agreement must necessarily be to alter the state both of the assets and liabilities of the partnership, as they stood at the dissolution, and, by so doing, to alter the position of *Lipscombe*, and this, in my opinion, it was not competent to *Currie* to do and at the same time to hold *Lipscombe* to his liability upon the bond.

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It was attempted to meet this view of the case, by alleging that the partnership was continued only for the purpose of being wound up. Whether the right of *Currie* against *Lipscombe* upon the bond would have remained if this had been really the case, is a point upon which I give no opinion whatever. It does not appear to me that the facts of this case warrant that question being raised, for I see no trace whatever of any steps having been taken to wind up this partnership. On the contrary, I am satisfied, from the cross-examination of *Boyes*, and the inspection of the books, that the business was carried on, after the expiration of the partnership, just in the same manner as it had been carried on during its continuance, and without any attempt to wind it up, in the proper sense attaching to that expression. That it may have been in the course of winding up in this sense, that the monies received from customers were placed to their accounts, and so operated to discharge the debts which were due from them, is possible; and this I presume is what is meant by Mr. *Currie's* answer, but this was clearly not such a winding up as he, or *Lipscombe*, standing in his place, had the right to insist on. Even supposing, however, that it was, the partnership was not finally wound up at the period when the dissolution took place in *April* 1849, and yet upon that dissolution all the assets of the partnership are permitted by *Currie* to pass into the hands of *Butterfield*, and the business is continued by him as before. How can this be justified as against *Lipscombe* the surety? It is said, however,

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however, that *Lipscombe* acquiesced. But acquiescence imports knowledge, and there is nothing to show that *Lipscombe* did at all know the terms on which the business was carried on.

I am of opinion, therefore, that the Plaintiffs are entitled to be relieved from this bond, and that the decree must be altered, by directing the bond to be delivered up to be cancelled, and awarding a perpetual injunction to restrain proceedings upon it. I think that the deposit should be returned, and that there should be no costs of any part of the suit, either on one side or the other. Both the parties have been engaged in a transaction which neither of them ought to have entered upon, and which no Court of justice can countenance, and the Plaintiffs have failed as to part of the case which they have brought forward.



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July 10, 14.

Before The
Lord Chan-
cellor, LORD
CRANWORTH.

An executrix and trustee under a will employed her co-trustee, who was a solicitor, to transact the necessary legal business of the trust:—*Held*, that the solicitor was only entitled to costs out of pocket.

BROUGHTON v. BROUGHTON.

IN this suit, which was one for the administration of the estate of *Thomas Broughton* deceased, the Master, in taking the accounts, had disallowed the amount of certain bills of costs claimed to be due by *F. T. White* and his copartners as solicitors, *F. T. White* having been one of the trustees of the testator's will, and having been employed by his co-trustee, who was also the testator's executrix, to transact the business to which the bills of costs related. *F. T. White* took exceptions to the Master's Report, which were argued before Vice-Chancellor

The principle of the general rule applicable to such cases explained.

The case of *Cradock v. Piper*, 1 Mac. & G. 664, and, in connexion with it, that of *Lincoln v. Wndson*, 9 Hare, 158, remarked upon.

Chancellor *Stuart* in *December* 1854, when his Honor, considering himself bound by authority, held that Mr. *White* was only entitled to the costs out of pocket, and overruled the exceptions: the present Appeal was then brought to the Lord Chancellor.

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A very full notice of the facts of the case, and the arguments of counsel, will be found, together with the judgment of the Vice-Chancellor, in the 2nd Volume of Messrs. *Smale & Giffard's* Reports, page 422. The following short statement will be therefore sufficient to place the case intelligibly before the reader.

Mr. *White* had acted as the solicitor of the testator in his lifetime, and being then in partnership with Mr. *Lindsay*, had jointly with him taken steps for bringing to sale the testator's real estates, but the object was only partially accomplished at the testator's death, which took place on the 23rd *November* 1843. The testator, by his will dated in *October* 1843, appointed his wife and Mr. *White* trustees for the sale of all his real estates, and to hold the proceeds in trust for his wife absolutely; and he appointed his wife sole executrix. After the testator's death, and by the direction and at the request of Mrs. *Broughton*, who died subsequently, Mr. *White* (being in partnership first with Mr. *Lindsay* and afterwards with Mr. *Calthorp*) managed the sales of the testator's property, and other business connected with his estate; and the claim made by Mr. *White*, and disallowed by the Master as above stated, was in respect of this business.

Mr. *Malins*, and Mr. *J. H. Palmer*, for Mr. *White*, supported the Appeal.

They submitted that the rule, as it was generally laid
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down, that a trustee or executor being a solicitor could not charge as a solicitor for business done by him, ought to be subject to exceptions, and that to apply it in the present case was inconsistent with any true principle, and would operate very harshly. They stated that the justice of Mr. *White's* claim had been felt strongly by the Master (now Vice-Chancellor *Kindersley*), and that the Vice-Chancellor, from whose decision the present Appeal was brought, expressed a wish that the matter should be more fully considered. They further submitted that the rule had received a proper modification in the case of *Cradock v. Piper (a)*, in which Lord *Cottenham* had treated it as applying only to the costs of a trustee acting as a solicitor for himself, thus bringing it within the general principle that a trustee was not to make his office a source of personal emolument; that in *Moore v. Frowd (b)* Lord *Cottenham* had exactly provided for a case like the present, when he said that parties might agree that a trustee, being a solicitor, should have some benefit beyond what the law would otherwise have allowed; for Mr. *White* had acted by the direction and at the request of Mrs. *Broughton*, and on the understanding that he should be paid. They referred to *Lincoln v. Windsor (c)*, in which Vice-Chancellor *Turner* had held that the decision in *Cradock v. Piper* applied only to the case of costs incurred in a suit, and not to costs incurred in the administration of an estate without a suit; but they submitted that the real test was, whether the employment was the act of the solicitor alone or whether it was requisite that others should join with him in it; that in the latter case the rule did not really apply, and that though the Court must watch narrowly the conduct of solicitors acting as trustees, there was no reason why, if a testator chose to select a solicitor as his trustee or executor,

(a) 1 *Mac. & G.* 664. (b) 3 *Myl. & Cr.* 45. (c) 9 *Hare*, 158.

executor, the solicitor should not be able to act and receive remuneration.

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They cited and commented on *Ayliffe v. Murray* (a), *Bainbrigg v. Blair* (b), *Todd v. Wilson* (c), *Christophers v. White* (d), *York v. Brown* (e).

Mr. Bacon and Mr. Chapman Barber supported the decision of the Vice-Chancellor.

They commented on the cases referred to by the other side, and submitted that neither on general principle nor on particular circumstances could Mr. White receive anything but costs out of pocket; he was not entitled to "profit costs." They referred to some remarks made by Lord Brougham in the case of *Manson v. Baily*, before the House of Lords, in June last (unreported), in which his Lordship, alluding to *Cradock v. Piper*, said, that if that case had been at all adopted in any of the decisions of the House he should be very slow to express any doubt which he might have upon it; but if it had never been so adopted or countenanced in decisions there, then he might be permitted to state that he had great doubts respecting the soundness of that decision to the length to which it went; they stated, however, that they were contented to rest the present argument on the authority of *Cradock v. Piper*, as interpreted by Vice-Chancellor Turner in *Lincoln v. Windsor*.

Mr. Torriano appeared for other parties.

The LORD CHANCELLOR.

I will not wait for a reply in this case (f); indeed

no

(a) 2 Atk. 58.

(b) 8 Beav. 588.

(c) 9 Beav. 486.

(d) 10 Beav. 523.

(e) 1 Coll. 260.

(f) Mr. Malins happened not to be present at the conclusion of the argument of the Respondent's Counsel.

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no reply can be necessary. The rule applicable to the subject has been treated at the bar as if it were sufficiently enunciated by saying, that a trustee shall not be able to make a profit of his trust, but that is not stating it so widely as it ought to be stated. The rule really is, that no one who has a duty to perform shall place himself in a situation to have his interests conflicting with that duty; and a case for the application of the rule is that of a trustee himself doing acts which he might employ others to perform, and taking payment in some way for doing them. As the trustee might make the payment to others, this Court says he shall not make it to himself; and it says the same in the case of agents, where they may employ others under them. The good sense of the rule is obvious, because it is one of the duties of a trustee to take care that no improper charges are made by persons employed for the estate. It has been often argued that a sufficient check is afforded by the power of taxing the charges, but the answer to this is, that that check is not enough, and the creator of the trust has a right to have that, and also the check of the trustee. The result therefore is, that no person in whom fiduciary duties are vested shall make a profit of them by employing himself, because in doing this he cannot perform one part of his trust, namely, that of seeing that no improper charges are made. The general rule applies to a solicitor acting as a trustee, and the only question is how far the circumstances of the present case take it out of this rule.

It is in the first place sought to take this case out of the rule on the authority of *Cradock v. Piper* (a); and here I must own, speaking with all deference and not meaning to decide anything on the point, that I cannot see any distinction between costs incurred in a suit and costs incurred

(a) 1 Mac. & G. 664.

curred in administering an estate without a suit; the danger may possibly be less in the former case than in the latter, but the principle is the same. As every trustee is bound to protect the estate against improper charges, there must also exist the same difficulty in principle in his acting for himself and others, as in acting for himself alone; and as to this, when the point was mentioned in the House of Lords, I felt the same difficulty in understanding the difference as was felt by the noble lord whose remarks have been quoted. In *Cradock v. Piper*, however, the general rule might have been probably safely relaxed; and where the question related to charges incurred in a suit, there would be considerably less danger in relaxing it where the parties had been made Defendants, than where they had filled the character of Plaintiffs. If, therefore, the circumstances of the case before me had brought it within the same class, I should have felt myself bound to follow the decision of *Lord Cottingham*, which, however, appears to me to overrule the previous decision of the Master of the Rolls in *Bainbrigg v. Blair* (a), but the circumstances of the present case are not in my opinion similar, I mean in degree, and the decision in *Cradock v. Piper* goes on degree merely.

It has been said that the present is the case of a trustee solicitor employed by the cestui que trust, who was also his co-trustee. I should have been glad to find any substantial distinction in this, but the fact is that the real cestuis que trust are the creditors, and also, if the fund is solvent, the person entitled. Then it is said that it is a distinction without a difference to apply the rule, as explained in *Cradock v. Piper*, to a suit and not to general business. I feel, I confess, pressed by that argument,
and

(a) 8 Beav. 588.

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and would be glad to aid the solicitor in the present case if I could do so, but I cannot, for *Lord Cottenham* mentions as being right the judgment of *Lord Lyndhurst* in *New v. Jones* (a), and I could not give Mr. *White* his costs without saying that *New v. Jones* was wrongly decided. Therefore, without relying on the decision of Vice-Chancellor *Turner* in *Lincoln v. Windsor*, from which I would not readily dissent, I cannot go against *New v. Jones*; and to decide the present case as I am asked by the Appellant to decide it would be also to say that *Cradock v. Piper* is wrong because the judge there says that *New v. Jones* is right.

On the whole, then, though agreeing with the Vice-Chancellor that Mr. *White's* conduct was perfectly honest, yet as the general rule is useful for the security of cestuis que trust, I must act on it and cannot aid the claim.

The rule appears not to be generally understood, though it is better understood now than it was formerly, for one continually sees provisions introduced into wills and settlements enabling a solicitor, acting as trustee, to receive remuneration just as if he had not been appointed trustee, and it is very often convenient to make this arrangement. No such provision, however, was made in the present case, and the solicitor's costs cannot, therefore, be properly allowed. The appeal must be dismissed, but there will be no costs.

(a) 1 *Mac. & G.* 668, n.

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THIS was an appeal by the Defendant *Aaron Smith*, from a decree made by the Master of the Rolls, on the 21st *December* 1854, in favour of the Plaintiffs.

The Bill was filed on the 19th *April* 1854 by *William Pennell*, Official Assignee, and *J. P. Judd*, Creditors' Assignee, of the estate of *J. R. Pease* and *W. H. Pease*, bankrupts; and it sought to have a certain Indenture, dated the 11th *April* 1846, and Warrant of Attorney of the same date, declared void, and that the Defendant might be decreed to deliver up the same, and to acknowledge satisfaction upon the record of the judgment entered up under the Warrant of Attorney, upon such terms, in respect of the money actually advanced by the Defendant as the consideration for the annuity granted by the Indenture and the interest thereof, as the Court should think reasonable.

The Indenture in question was dated the 11th *April* 1846, and was made between *J. R. Pease* and *W. H. Pease* of the one part, and the Defendant *A. Smith* of the other part: it recited (amongst other things) the will of *W. Pease* deceased, that each of them the said *J. R.*

Pease,

June 20.

July 18.

Before The Lord Chancellor, LORD CRANWORTH.

On a bill filed to set aside a deed securing an annuity as being void by reason of the return of the consideration under the sixth section of the Act 53 *Geo.* 3, c. 141:—

Held, in reference to an objection that no relief could be granted in Equity, that the intention of the Act was to give the same power to a Court of Equity in regard to an annuity to be enforced by suit as to a Court of Law in regard to an annuity to be enforced by action.

Held, also, that the burthen of proof was on the Plaintiff to make out that there was a return of the consideration within the meaning of the section; that if the consideration was actually paid to the grantor, the application of it by him in discharge of debts really due from him to the grantee would not be such return; nor (*semble*) would it be so even if the grantor had previously told the grantee that he would make such an application of it.

In this case, the Lord Chancellor, not being on the whole satisfied that the Plaintiff had established the return of the consideration, dismissed the bill, but without costs, on the ground that in a transaction of the nature of the one in question the Defendant was bound to have been prepared with clear proof in support of his title.

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Pease and *W. H. Pease* being two of the children of the testator was entitled to one-fifth part share or proportion of and in all his real and personal estate and effects and the rents interest dividends annual and other produce thereof and to accrue due thereon together with a proportionate part or share of the part or share of either of the testator's daughter or daughters in the event of their dying without issue and also a proportionate part or share of the part or share of either of the testator's son or sons in the event of their dying under the age of twenty-one years, that *J. R. Pease* and *W. H. Pease* had contracted with *A. Smith* for the absolute sale to him of one annuity or clear yearly sum of 75*l.* to be paid to *A. Smith* his executors administrators or assigns during the lives and life of the said *A. Smith Lavinia Smith Sophia Day Anne Boast* and *John Boast* and the life of the survivor of them and to be secured in manner after mentioned at or for the price or sum of 750*l.*, that for securing payment of the said annuity the said *J. R. Pease* and *W. H. Pease* had given a warrant of attorney for 1500*l.* and costs of suit, that upon such treaty it was agreed that the annuity should be further secured by an assignment of the two-fifth parts shares or proportions of the said *J. R. Pease* and *W. H. Pease* of the real and personal estate and effects of the said testator and the rents interest dividends annual and other produce thereof together with all other their interests and interest under the said will and also by the several provisions covenants and agreements after also contained, that the said annuity might be repurchased upon the terms after mentioned and that the costs and expenses of preparing and perfecting the several securities for payment of the said annuity and of preparing and filing a memorial thereof should be borne and paid by the said *J. R. Pease* and *W. H. Pease*: It was witnessed that in pursuance of the said agreement and in consideration

consideration of 750*l.* paid &c. *J. R. Pease* and *W. H. Pease* did grant unto *A. Smith* his executors administrators and assigns during the natural lives of the said *A. Smith L. Smith S. Day A. Boast* and *J. Boast* and during the life of the survivor of them one annuity or clear yearly sum of 75*l.* payable as therein mentioned: And payment of the said annuity was secured by the joint and several covenant of the said *J. R. Pease* and *W. H. Pease* in the Indenture contained: It was further witnessed that for the consideration aforesaid the said *J. R. Pease* and *W. H. Pease* did grant and assign unto the said *A. Smith* his heirs executors administrators and assigns all those the two several fifth parts shares proportions and interest and also all the interest whatsoever in possession expectancy possibility or otherwise howsoever of them the said *J. R. Pease* and *W. H. Pease* and each and either of them of and in the real and personal estate and effects of the said testator *William Pease* and the rents dividends interest or annual and other proceeds thereof then due and thenceforth to accrue due for and in respect of the same and of and in all monies produced or to be produced therefrom respectively and the funds and securities for the same to hold upon the trusts in the Indenture expressed for more effectually securing the due and punctual payment of the said annuity thereby granted and all such costs charges and expenses as he or they might bear or sustain for or by reason of the trusts thereby reposed in him or them: And it was by the Indenture agreed and declared that if at any time thereafter the said *J. R. Pease* and *W. H. Pease* their heirs executors or administrators or either of them should be desirous of redeeming or repurchasing the said annuity thereby granted and should give seven days' previous notice in writing to the said *A. Smith* his executors administrators and assigns and at or before the expiration of the time mentioned in such notice

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notice should pay or cause to be paid to the said *A. Smith* his executors administrators or assigns all arrears then due of the said annuity and all costs charges and expenses then due and payable under or by virtue of the Indenture and should also pay to the said *A. Smith* his executors administrators or assigns the sum of 750*l*. then the said annuity and the powers &c. before given for enforcing payment thereof should cease and determine and the said *A. Smith* his executors administrators or assigns should re-assign the premises comprised in the Indenture and deliver up the warrant of attorney or cause satisfaction to be entered on the judgment to be entered up thereunder.

The following receipt, signed by *J. R. Pease* and *W. H. Pease*, was indorsed on the Indenture:—"Received the day and year first within written of and from the within named *Aaron Smith* the sum of seven hundred and fifty pounds being the consideration money within-mentioned to be paid by him to me in manner following that is to say one note of the Governor and Company of the Bank of *England* for five hundred pounds dated 2nd *April* 1845 No. ^G_N 28,795, two other notes of the said Governor and Company for one hundred pounds each respectively dated 5th *July* 1845 Nos. ^H_I 71,985 and ^H_I 76,731, and one other note of the said Governor and Company for fifty pounds dated 6th *October* 1845 No. ^H_{II} 82,077."

A Memorial of the Indenture was duly inrolled on the 22nd *April* 1846, and therein the consideration for the grant of the said annuity of seventy-five pounds a year was stated to be "seven hundred and fifty pounds paid in notes of the Governor and Company of the Bank of *England*."

A Warrant of Attorney was executed by *J. R. Pease* and *W. H. Pease*; and, on the 22nd *April* 1846,
 judgment

judgment for the sum of 1,500*l.* and costs of suit was entered up thereunder in the Court of Queen's Bench, against *J. R. Pease* and *W. H. Pease*.

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The following is the substance of the case as stated by the Bill in reference to the transaction in question:— Prior to and at the date of the Indenture, *J. R. Pease* and *W. H. Pease* carried on business in partnership with *W. H. Thompson* as wine merchants at *Ingram Court Fenchurch Street* in the city of *London*, and the Defendant had various dealings with the firm, and also with each of them *J. R. Pease* and *W. H. Pease*, and from time to time advanced monies and discounted bills and notes to and for the firm, and to and for each of them the said *J. R. Pease* and *W. H. Pease*, at rates of interest greatly exceeding five pounds per cent. per annum, and in some instances amounting to or exceeding sixty pounds per cent. per annum, and the Defendant also knew, as the fact was, that the firm and *J. R. Pease* and *W. H. Pease* individually were in embarrassed circumstances and in want of money. Shortly before the date of the Indenture, *J. R. Pease* and *W. H. Pease* requested the Defendant to afford them pecuniary assistance to enable them to pay a creditor who had obtained judgment against them in respect of speculations in railway shares, and at their request the Defendant called upon and saw Mr. *John Shaw*, the attorney of the judgment creditor, who informed the Defendant that if *J. R. Pease* and *W. H. Pease* did not speedily pay the judgment debt he would sell them up or he used words to that effect, whereupon the Defendant told Mr. *Shaw* that he the Defendant would enable them to pay the debt or used words to that effect. Prior to the execution of the Indenture, it was agreed between the Defendant and *J. R. Pease* and *W. H. Pease*, that they should execute to the Defendant a security for 750*l.*, and that out of monies

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monies to be advanced by the Defendant, 220*l.*, the amount of debt and costs owing upon the judgment, should be paid, and that *J. R. Pease* should have for his own use 30*l.*, and that the sum of 500*l.*, (which with the said sums of 220*l.* and 30*l.* would make the 750*l.*,) should be retained by the Defendant, or having been advanced by him to *J. R. Pease* and *W. H. Pease* should be returned by them to the Defendant, in or towards satisfaction of monies alleged by the Defendant to be owing to him from *J. R. Pease* and *W. H. Pease* or one of them in respect of former dealings and transactions and of the costs of preparing and perfecting the security. Accordingly Mr. *J. D. Wells*, the solicitor of the Defendant, caused the Indenture in question to be prepared and engrossed upon instructions received from the Defendant, but no solicitor was employed on behalf of *J. R. Pease* and *W. H. Pease* or either of them, and they or either of them never gave any instructions to Mr. *Wells* to prepare the same, and never saw any draft or copy thereof. At a meeting held about midday on Saturday the 11th April 1846, at the office of Mr. *Wells* in King William Street in the city of London, the Indenture was executed by *J. R. Pease* and *W. H. Pease*, and there were present at the meeting *J. R. Pease*, *W. H. Pease*, Mr. *Shaw*, Mr. *Wells*, and the Defendant, and no other person. Prior to the meeting, but on the same day, the Defendant received from his bankers the bank notes for 500*l.*, 100*l.*, 100*l.* and 50*l.* mentioned in the receipt indorsed on the Indenture, and produced them at the meeting, and with the three last mentioned notes the 220*l.* was paid to Mr. *Shaw* in satisfaction of the judgment debt and costs, and the sum of 30*l.* was taken by *J. R. Pease* for his own use but no further payment was made to *J. R. Pease*, and no payment whatever was made to *W. H. Pease*, and the Defendant when the meeting broke up took away with him

him the note for 500*l.* and paid it into his bankers on the same day to his credit there. The Defendant paid the bill of costs of Mr. *Wells* for preparing the security.

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The Bill contained also the following statement as the foundation for the relief sought:—"On the said 11th April 1846 no debt was owing to the Defendant from the said *J. R. Pease* and *W. H. Pease*, or either of them, or if any debts or debt were or was then owing from them or either of them to the Defendant, the same were or was less in amount than the amount retained by or returned to the Defendant, and he retained or accepted a return of such last mentioned amount in pursuance of some previous agreement or understanding that the same should be so retained or returned; or if without any such agreement or understanding any part of the said sum of 750*l.* was returned to the Defendant by the said *J. R. Pease* and *W. H. Pease*, or either of them, in satisfaction of any such debts or debt the same was so returned by them or him voluntarily, and when in insolvent circumstances and in contemplation of their bankruptcy, and without pressure on the part of the Defendant, and the payment so made was a fraudulent preference within the meaning of the bankrupt laws."

The Answer of the Defendant represented the circumstances under which the Indenture was executed as being;—that *J. R. Pease* and *W. H. Pease* were severally indebted to a Mr. *Taplin* in respect of money lost by them in railway speculations, and were being sued by him by Mr. *Shaw* his attorney, and judgments had been obtained by Mr. *Taplin* in the actions, and execution was threatened against *J. R. Pease* and *W. H. Pease*, and it was principally in order to avoid such execution that they required a sum of 750*l.*, and made the application to the Defendant which resulted in the grant of the annuity,

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annuity, and after the same had been arranged, and before it was completed, the Defendant, at the request of *J. R. Pease* and *W. H. Pease* or one of them, went to Mr. *Shaw*, and informed him of the arrangement, and induced him to forbear issuing execution until the same should be completed; that Mr. *Shaw* was present on the completion of the transaction, which took place at Mr. *Wells'* office as stated in the Bill, and attested the receipt for the 750*l.* and also the warrant of attorney and the defeazance thereon which contained a recital of the payment of the 750*l.*; that the 750*l.* was actually paid to and received by *J. R. Pease* and *W. H. Pease* in Bank of England notes, and they paid part thereof forthwith to Mr. *Shaw* and the Defendant presumed that the amount so paid was the amount for which the judgment was recovered together with Mr. *Shaw's* costs; that *J. R. Pease* and *W. H. Pease* or one of them took away with them or him what remained of the 750*l.*; that at a later period of the day *J. R. Pease* and *W. H. Pease* or one of them, at their office in *Ingram Court* paid the Defendant the amount due to him from them or one of them in respect of certain other transactions, and he gave them or him up the securities or security either by bill of exchange promissory note or I. O. U. which he held for the amount they or he so paid to him; that he had been in the habit of advancing money to them upon I. O. U.s and promissory notes, and of discounting for them the bills of exchange of their customers in the wine trade, and he did not remember the particular sum which he received on that occasion or on what securities or security the same was due; that the amount so paid to him did not, however, comprise all the sums in which *W. H. Pease* was indebted to him, for *W. H. Pease* still remained indebted to him in 40*l.* upon a promissory note originally drawn for 140*l.* for which he had proved against his estate, together with other monies subsequently,

quently lent, making the total amount proved 145*l*. The Defendant denied that, when the meeting at which the annuity deed was executed broke up, he took away with him the bank-note for 500*l*., or that he paid it into his bankers on the same day to his credit there; he stated that he appeared to have paid the same into his bankers on the 18th *April* 1846, but when or how he again became possessed thereof he did not then recollect. And the Defendant denied that any part of the 750*l*. was returned to him, except so far as the monies which he afterwards on the same day received in discharge of his other debt or debts were part thereof, or that any sum was paid to him as a bonus on the transaction or otherwise than in discharge of a debt bonâ fide due and owing to him. The Defendant stated that *J. R. Pease* and *W. H. Pease* had the possession of and uncontrolled dominion over the 750*l*. from the time when the same was paid to them, and had the power of disposing thereof in any way they thought fit.

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J. R. Pease and *W. H. Pease*, together with their partner, became bankrupt on the 6th *July* 1846: a dividend of one shilling and ninepence in the pound only had been declared on the joint estate, but no dividend had been declared on the separate estate of either *J. R. Pease* or *W. H. Pease*. The two bankrupts and also the Defendant were examined under the fiat touching the transaction in question: *J. R. Pease* stated that he received from the Defendant about 40*l*. on the execution of the Indenture; *W. H. Pease* said that he received nothing; and the Defendant, who was examined on three several occasions, gave a history of the matter which, though alleged in argument to be inconsistent with the statements contained in his Answer in the suit, may, for the purposes of this report and having regard to the judgment

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judgment of the Lord Chancellor, be considered as not materially varying from it.

In *November* 1847, a suit of *Green v. Bradley* (afterwards *Pennell v. Bradley*) was instituted by the assignees of the Messrs. *Pease* against all proper parties, including the present Defendant, for the administration of the estate of the testator *W. Pease*; but it was not until the 13th *June* 1853 that the rights of the persons interested, including the Messrs. *Pease*, were declared, and immediately afterwards the share of the Messrs. *Pease* was carried to the credit of their incumbrances. In *April* 1854 the Bill in the present suit was filed to impeach the security of the Defendant, who then presented a Petition in the administration suit for the transfer to him of the fund in Court. The Petition was brought on upon the 20th *April* 1854, and was ordered to stand over until the hearing of the present suit. It should here be mentioned that no attempt had been made in the administration suit to impeach the Defendant's security, and that Mr. *Wells* having gone to *Australia* in 1852, no information could be obtained from him; *J. R. Pease* had also left *England*.

The case was heard before the Master of the Rolls on the 12th and 13th *December* 1854; and his Honor, by a decree dated the 21st *December* 1854, ordered and decreed that the annuity should be set aside, and ordered an account to be taken of what was actually paid by the Defendant at the time of granting the annuity to the grantors thereof or either of them or for their or either of their use with interest thereon from that time at four per cent., and, on the Plaintiffs paying to the Defendant what should be found due on taking the account, ordered that the Defendant should deliver up to the Plaintiffs the Indenture of the 11th *April* 1846 and the copy
Warrant

Warrant of Attorney, and acknowledge satisfaction upon the record of the judgment entered up under the Warrant of Attorney, with liberty for the Defendant to prove under the bankruptcy for any sum due to him from the bankrupts or either of them at the time of granting the annuity, the Plaintiffs not to object to such proof upon any ground connected with the annuity transaction or on the ground of delay; and his Honor gave no costs of the suit to either party.

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The Master of the Rolls made this decree, being of opinion that, upon the facts of the case as appearing in the evidence, the transaction in question could not be supported, the following being the view which his Honor took of the evidence: he considered the state of the case to be this;—that in *April* 1846, the Messrs. *Pease* granted the annuity in question in consideration of 750*l.*, which was paid in four notes, namely, one for 500*l.*, two for 100*l.*, and a third for 50*l.*, at the meeting at the office of Mr. *Wells* in *King William Street*; that, of these notes, the two for 100*l.* each and the one for 500*l.* came into the possession of Mr. *Shaw* and were paid by him in to his bankers on the same evening, Saturday, and carried to his account, that the note for 500*l.* was paid in to the bankers of the Defendant either on the Saturday evening or Monday morning, the inference from this being that the 500*l.* was returned to the Defendant, and throwing the burden of proof on him to show it was not returned; that, assuming the transaction to have been such as the Defendant represented it, namely, that after the meeting was over in *King William Street* the Defendant and the Messrs. *Pease* went to the office of the latter in *Ingram Court* and thereupon the Defendant produced certain securities consisting of promissory notes and I. O. U.s and the Messrs. *Pease* repaid him the amount due upon those I.O. U.s and promissory notes, the transaction would be

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void, and could not be supported. His Honor considered, that if money was repaid by the grantor of an annuity to the grantee under pretence and color of a debt, assuming the debt to be a perfectly good debt due to the grantee, still the annuity could not under the Act of Parliament be supported; that if a creditor, having securities from a debtor, came to him and asked him to grant an annuity, and an annuity was thereupon granted to him, and the money immediately returned for the purpose of purchasing up the old debts which were due between the grantor and grantee of the annuity, that was no money transaction, and nothing more than the return of money. His Honor, however, was of opinion, on the evidence, that this was not the transaction in the present case, but that the 500*l.* was in point of fact returned to the Defendant.

The Defendant appealed against the decree of the Master of the Rolls, submitting that the Plaintiffs' Bill ought to have been dismissed with costs, or otherwise that the decree therein ought to have been more favourable to the Defendant than that which was made (*a*).

Mr.

(*a*) The following are the sections of the Act 53 *Geo.* 3, c. 141, to which reference will be found made in the argument:—

“II. And be it further enacted, that within thirty days after the execution of every deed bond instrument or other assurance whereby an annuity or rent-charge shall from and after the passing of this act be granted for one or more life or lives, or for any term of years or greater estate determinable on one or more life or lives, a memorial of the date of every such deed bond instrument or other assurance, of the names of all the

parties and of all the witnesses thereto, and of the person or persons for whose life or lives such annuity or rent-charge shall be granted, and of the person or persons by whom the same is to be beneficially received, the pecuniary consideration or considerations for granting the same, and the annual sum or sums to be paid, shall be enrolled in the High Court of Chancery in the form or to the effect following with such alterations therein as the nature and circumstances of any particular case may reasonably require [*Here follows the form*], otherwise every such deed

Mr. *R. Palmer* and Mr. *Bird*, for the Plaintiffs, supported the decree of the Master of the Rolls.

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They urged generally that there was no bona fides in the transaction, it being on the one side an effort made by desperate men to stave off bankruptcy, and on the other, an advantage taken of them by one well acquainted with their difficulties; that the Master of the Rolls was therefore quite justified in setting the deed aside, and the only real objection to the decree was, that it was in its terms too favourable to the Defendant. They referred to the sixth section of the Statute 53 *Geo. 3*, c. 141, and submitted that, after the 500*l.* was traced back into the possession of the Defendant, the onus was on him to show first, that it ever really got into the hands of the grantors of the annuity, and secondly that there were any debts then due by them to him of which he was entitled to

bond instrument or other assurance shall be null and void to all intents and purposes."

"VI. And be it further enacted, that if any part of the consideration for the purchase of any such annuity or rent-charge shall be returned to the person advancing the same, or in case such consideration or any part of it shall be paid in notes, if any of the notes with the privy and consent of the person advancing the same shall not be paid when due, or shall be cancelled or destroyed without being first paid, or if such consideration is expressed to be paid in money but the same or any part of it shall be paid in goods, or if the consideration or any part of it shall be retained on pretence of answering the future payments of the annuity or rent-

charge or any other pretence, in all and every the aforesaid cases it shall be lawful for the person by whom the annuity or rent-charge is made payable or whose property is liable to be charged or affected thereby to apply to the Court in which any action shall be brought for payment of the annuity or rent-charge or judgment entered, by motion to stay proceedings on the action or judgment; and if it shall appear to the Court that such practices as aforesaid or any of them have been used, it shall and may be lawful for the Court to order every deed bond instrument or other assurance whereby the annuity or rent-charge is secured to be cancelled, and the judgment, if any has been entered, to be vacated."

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to demand payment. They insisted that on both points the Defendant failed; and, with regard to the delay, they explained it as unavoidable under the circumstances of the case. They referred to *Chitty's Collection of Statutes*, Vol. I. p. 51, note (g), where the cases applicable to the present subject are collected, and cited *Jones v. Harris* (a), *Aguilar v. Aguilar* (b), *Belcher v. Var- don* (c).

Mr. J. V. Prior, for the Defendant.

He remarked on the length of time that had been allowed to elapse before instituting the present suit, and observed that *Wells*, the attorney who had managed the transaction, was now abroad, having never been asked any questions by the Plaintiffs when they had the opportunity of so doing. As far as the evidence went, the transaction was perfectly fair and clear. The admission of the Defendant's proof in the bankruptcy showed the existence of bonâ fide debts at the time when the deed was executed, and the cases established that the payment of a bonâ fide debt was not the returning of the consideration money intended to be checked by the Statute; *Barber v. Thomas* (d), *Gorton v. Champneys* (e), *Calton v. Porter* (f), *Aberdeen v. Jerdan* (g), *Bland v. Lord Alvanley* (h). The Plaintiffs had misconceived their remedy in coming to a Court of Equity at all; they ought to have applied to the Court of Queen's Bench, in which the warrant of attorney was entered up. The sixth section of the Act gave a discretionary power to order the annuity deed to be cancelled; it did not declare the deed void, as the second section did, which related to

(a) 9 Ves. 486.

(b) 5 Mudd. 414.

(c) 2 Coll. 162.

(d) 7 C. B. Rep. 612.

(e) 1 Bing. 287.

(f) 2 Bing. 370.

(g) 15 Q. B. Rep. 990.

(h) 15 Q. B. Rep. 994, note (a).

to cases of defective memorial, *Girdlestone v. Allan* (a), *Gorton v. Champneys* (b); and this being so, the power was to be exercised by the Court in which the Act placed it, that is, the Court in which the action would be brought. *Bromley v. Holland* (c) and other cases showed in what way the Court was in the habit of exercising its power in instances similar to the present; and if the annuity was to be set aside, it could, consistently with principle and authority, be on no other terms than those imposed by the Master of the Rolls.

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Mr. G. M. Giffard followed on the same side.

He could not say that the point of jurisdiction had been pressed before the Master of the Rolls, but it was most material. The Bill in the present case was without precedent; it was an attempt to put in force a section of the Statute which was never intended to be applied to proceedings in Equity. He had examined all the cases in this Court of setting aside grants of annuities, but there was no instance of a grant being set aside on the ground of the return of the consideration, although there were many of this being done for defective memorial, the jurisdiction in those cases being founded on the declaration in the second section of the Statute making the security null and void to all intents and purposes; there was, however, no such declaration in the sixth section. The point now raised had been adverted to in *Philipps v. Crawford* (d), but in that case there was also a defective memorial, and on that the discussion chiefly turned: the case of *Underhill v. Horwood* (e) was also one of defective memorial. The principle applicable to awards, governed by the Statute

9 & 10

(a) 1 B. & C. 61.

(b) 1 Bing. 287.

(c) 5 Vca. 610.

(d) 9 Ves. 214; 13 Ves. 475.

(e) 10 Ves. 209.

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9 & 10 *Will.* 3, c. 15, was analogous to that now in question; and in *Nichols v. Roe* (a) it was held, that this Court had no jurisdiction to grant relief. On the evidence it was clear that the consideration was bonâ fide paid to the grantors, though it was afterwards returned, and that they had the money in their possession, and could have done what they pleased with it: what they did, was to apply a portion of it in settling their debt with the Defendant, and the case thus fell within the remark of Lord *Campbell* in *Aberdeen v. Jerdan* (b) where his Lordship said that "the return meant by the Statute must be without consideration, not for an actual debt." The length of time which had elapsed was also an answer to the Plaintiffs' claim, for the Court always required parties to be active in taking proceedings of this nature: the Plaintiffs might have impeached the Defendant's security in the administration suit, but they had not chosen to do so.

Mr. *Bird* replied.

The objection as to jurisdiction was not pressed before the Master of the Rolls; but this annuity having been obtained without consideration, the Court would have jurisdiction to set the deed aside independently of the Statute. Besides this, the Defendant had given the Court jurisdiction by the proceedings he had himself taken to obtain the fund. With regard to delay, it had not been greater than had occurred in other cases where the Court had nevertheless granted relief, *Drake v. Rogers* (c), and it was also satisfactorily accounted for. As to any instance of a suit in this Court to set aside an annuity deed on the ground of the return of the consideration, none occurred to him at the present moment, but

wit

(a) 3 *Myl. & K.* 431.

p. 993.

(b) 15 *Q. B. Rep.* 990. See

(c) 4 *Moore*, 402.

with the permission of his Lordship, he would look and mention any that he found.

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Mr. Bird mentioned *Philipps v. Crawford* (a), as an instance of a suit under the fourth section of the then Annuity Act, 17 Geo. 3, c. 26, which was precisely similar to the sixth section of the Act in question in the present case.

June 23.

Mr. Lee, Amicus Curiae, mentioned *Hall v. Lack* (b), and *Elderton v. Lack* (c).

The LORD CHANCELLOR now delivered judgment :—

July 18.

He observed that the object of the bill was to set aside a deed, by which Messrs. Pease had assigned certain residuary properties to which they were entitled to the Defendant by way of securing to him the payment of an annuity. The case made on the part of the Plaintiffs, who were the assignees in bankruptcy of the grantors, was, that the assignment was executed on the 11th April 1846, that the Messrs. Pease became bankrupt three months afterwards, that there was a memorial of the deed enrolled, the consideration for the annuity being 750*l.* paid in Bank of *England* notes, but that this was only a colorable transaction, because a portion of the money was immediately afterwards returned to

(a) 9 Ves. 214.

Exchequer, November 1847 (1 *Exch. Rep.* 300).

(b) Before the Q. B., 11th June 1845 (*Law Times*, Vol. V. p. 238); in Chancery, April 1846 (*Law Times*, Vol. VII. p. 77); and before the Court of

(c) In Chancery (see 2 *Phil.* 680); and before the Court of Exchequer, 11th January 1849 (not reported).

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to the Defendant *Smith* by the Messrs. *Pease*; and the bill therefore sought to set aside the grant on the ground of the return of the consideration.

Whether the Plaintiffs were or not entitled to the relief thus sought, depended upon whether the case was within the sixth section of the Annuity Act of 1813 (53 *Geo.* 3, c. 141), which enacted, that, &c. [His Lordship read the sixth section as above set out.] The Master of the Rolls had had the case very fully argued before him, but the only question there had been, whether, as a matter of fact, the consideration money had or had not been returned. The Master of the Rolls had considered it established to his satisfaction, that some portion was returned within the meaning of the Act, and had made an order setting aside the annuity on certain terms.

When, however, the case came on upon the appeal, another point was made, for the Defendant not only contended that it was not made out that any part of the consideration was returned, but argued that even if that were made out, the relief sought could not be granted, because, although the Court would order an annuity deed to be delivered up, on its being proved to be void on the ground of a defective memorial, under the second clause of the Act, the same relief could not be granted in a case falling within the sixth clause. On that point he, the Lord Chancellor, had felt some doubt during the argument, but, on consideration, was satisfied that there was nothing in it. When the legislature provided that application might be made to the Court in which the action should be brought for payment of the annuity, and that it should be lawful for the Court to order the deed securing the annuity to be cancelled, it must have meant, in the case of any annuity which was to be enforced in equity, to give the
Court

Court of Equity the same power over the deed as a Court of Law would have had where the annuity was to be enforced in an action. His Lordship was quite clear, on general principles, that if the case was of such a nature as to render it necessary to seek the relief in equity and not at law, this Court must be able to give the same relief as would be given at law. The objection, therefore, which was not before the Master of the Rolls, ought not to succeed.

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His Lordship said, that the opinion just expressed would, however, turn out to be merely extrajudicial, for, on looking at the case, he did not find it made out that there was any return of the consideration money within the meaning of the clause. This was properly a question of fact, and the burden of proof was on the Plaintiffs to show that any part of the consideration money was returned. In reference to this, it must be admitted that they made a great advance towards such proof, by showing that one of the bank notes in which the consideration was paid was in the hands of the Defendant *Smith* immediately after the transaction, but the question still was, whether the Court could say, having regard to the case made on the part of the Defendant, that the Plaintiffs had established their proposition sufficiently clearly to enable the Court to set aside the deed. His Lordship then alluded to the view taken of the facts by the Master of the Rolls in his judgment as above stated, and observed that he could not agree in the conclusion to which his Honor had come.

The question upon the sixth section of the Act was, whether the consideration was or not paid: if the consideration or any part of it was paid for the purpose of being returned, or if it was only pretended to be paid
 when

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when it was not really paid, the transaction would be a pretence within the meaning of the clause; but if the money was actually paid, and there were debts owing by the grantor to the grantee, the case would be different, and the whole question was, whether what was done was a colorable pretence or not. When in the present case it was stated that the consideration was 750*l.*, if that sum was really paid, but if at the same time there were also really debts due from the Messrs. *Pease* to *Smith*, and they, having money in their hands, thought fit to apply it in discharge of those debts, his Lordship did not think that that was any return of the consideration money within the meaning of the clause in question, and he would go even the length of holding that it would not vary the case if they had told *Smith* beforehand that they would so apply the money, a statement which might undoubtedly operate on his mind in entering into the transaction. Having thus stated what he considered to be the construction of the clause, the question was, had the Plaintiffs made out that the transaction was a colorable transaction.

His Lordship, in reference to this, proceeded to remark on the statement of the case put forward by each party and on the evidence offered in support of it: he observed, that the account given by the Defendant was not unnatural, that it was substantially confirmed by the evidence of the Messrs. *Pease*, that the assignees being aware of *Smith's* claim and on that account making him a party to the suit of 1847 had not impeached the transaction until they did so by the present suit, that the consequence of this delay was, that those who might have thrown light on the matter (*Mr. J. R. Pease* and *Mr. Wells*) were absent, and the Court could not assume that if present they would have stated anything not in conformity with the Defendant's account.

His

His Lordship then added that, though if the burden had rested on the Defendant *Smith* to establish his case, the matter would have been left in doubt, yet as he relied on the deed he could not, on the evidence as it stood, be treated as having been guilty of a fraudulent transaction. His Lordship thought it impossible to come to the conclusion that it was such, and he was of opinion that the Plaintiffs had failed to make out their case.

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The decree must therefore be to dismiss the bill, but not with costs, because persons who were parties to transactions of this kind ought to take care to have everything in readiness to make out their right clearly. The present Plaintiffs, as assignees, might, as between themselves and those for whom they acted, have a good case for not having proceeded earlier, but that circumstance ought not to prejudice the party against whom they now sought relief. The result would therefore be, that the bill must be dismissed, but without costs.

His Lordship subsequently remarked, in reference to the interpretation to be put on the sixth section of the Act, that it would be a very narrow construction to hold that the word "action" would not include a suit in Equity.

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In the Matter of The Trusts of the Annuity of £600,
given by the Will of JOHN WYNCH, deceased,

March 18, 25,

29.

April 21.

June 14.

AND

In the Matter of The Act 10 & 11 Vict. c. 96.

Ex parte WYNCH.

Before The
Lord Chan-
cellor, LORD
CRANWORTH
and The LORDS
JUSTICES.

Bequest to
A. M. a mar-
ried woman of
an annuity
"for her life
and the issue
from her body
lawfully be-
gotten on

failure of which to revert to my heirs," with a request that *K.* and *C.* would act as trustees for *A. M.* so that the annuity might be secured for her sole use and benefit :—Held, by the Lord Chancellor and the Lord Justice Turner, the Lord Justice Knight Bruce giving no opinion on the point, that *A. M.* took an interest for life only with a gift in the nature of a remainder to her issue.

Held, by the Lord Justice Turner, that according to the true construction of the devise the life interest of *A. M.* was merely equitable and the interest of the issue legal, and that therefore *A. M.* could not have taken an estate tail even if the devise had been of real estate; and also, that, admitting the annuity to partake of the nature of real estate, it did not follow that in construing the will it ought to be treated as real estate, for that it was in fact personal estate with peculiar incidents belonging to it in that character.

There is nothing in the decisions relative to the limitations of personal estate by which an absolute interest has been held to be given to the first taker, which obliges the Court in construing bequests of personalty, where technical words are not used and the interest of the first taker is expressly confined to a life estate, to act on principles derived from laws of tenure and not resting on intention.—By the Lord Chancellor.

The Court, in construing a disposition by will of personal estate, is not to be absolutely governed by the rules which would be applied at law in the case of real estate.—By the Lord Justice Turner.

The decision of Lord Thurlow in *Knight v. Ellis* 2 Bro. C. C. 570, approved of and held not to have been overruled; and the cases of *The Attorney-General v. Bright* 2 Keen, 57, *Tate v. Clarke* 1 Beav. 100, *Jordan v. Lowe* 6 Beav. 350, and *Bird v. Webster* 1 Drew. 338, commented upon.—By the Lord Chancellor and the Lord Justice Turner.

THIS was an Appeal from the decision of Vice-Chancellor *Stuart*, on a Petition presented by the Rev. *Henry Wynch* as the representative of *George Wynch*, praying for payment to him of a sum of 12,600*l.* 3*l.* 5*s.* per cent. Annuities standing to the credit of this matter, the amount of a fund paid into Court under the above-mentioned Act by the surviving trustee thereof, and 993*l.* 17*s.* 11*d.* cash the dividends of the stock.

The

The case was by arrangement discussed as if the parties
opposing the claim of the Petitioner had presented a
Cross Petition.

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The question arose under the will of *John Wynch*,
Iate of *Vellore* in the *East Indies*. The testator by his
Will, dated the 8th *March* 1796, after directing the pay-
ment of his funeral and testamentary expenses &c.,
Proceeded to make the following bequest:—"I give and
bequeath to my good and virtuous friend *Anna Maria*
Mealy now wife of *Ridgway Mealy* Lieutenant and Fort
Adjutant of *Vellore* in the Hon. *East India* Company's
service an annuity of 600*l.* sterling to commence six
months after my decease for her life and the issue from
her body lawfully begotten on failure of which to revert
to my heirs And I have to request that my very good
friends *Nathaniel Edward Kindersley* Esq. and *Thomas*
Cockburn Esq. will act as trustees for the said *Anna*
Maria Mealy so that the said annuity may be secured
for her sole use and benefit and that it may be paid to
her quarterly or half-yearly as they may deem proper:"
and the testator appointed his brothers *George Wynch*
and *James Wynch* his executors and residuary legatees.

The testator died in 1797, and his executors proved
his will in *India*, and subsequently in *England*.

By an Indenture, dated the 8th *March* 1798, and
made between the executors of the one part, *Adrian De*
Fries and *John De Fries* of *Madras* merchants of the
second part, and the said *N. E. Kindersley* and *T.*
Cockburn of the third part, after reciting the will, and
that the said *N. E. Kindersley* and *T. Cockburn* had
declined accepting the trusts of it for a longer period
than the natural life of Mrs. *Mealy*, the executors
assigned to the said *Adrian De Fries* and *John De Fries*
their

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their heirs executors and administrators the sum of 20,000 star pagodas part of the testator's estate upon trust to pay out of the interest and produce of that sum the annuity of 600*l.* to the said *N. E. Kindersley* and *T. Cockburn* their heirs executors or administrators for the sole use and benefit of Mrs. *Mealy* during her life, and after her decease to repay the principal sum of 20,000 star pagodas to the executors who thereby bound themselves their heirs executors or administrators upon such repayment to cause the said annuity of 600*l.* to be paid to such issue of the body of Mrs. *Mealy* as should or might be lawfully begotten during the time of his her or their natural lives or the lives of the survivor or survivors to each an equal part or share with benefit of survivorship agreeably to the true meaning and intent of the will in such manner as they would have been bound to do if that deed had not been made: it was also provided by this deed, that if the executors should find it advantageous to the estate to remit the principal sum of 20,000 pagodas to *England*, and to place the same in the public funds, with such other and further sum as might be sufficient to produce an interest equal to the annuity, it should be lawful to the parties to enter into such other and further agreement as might be requisite for that purpose. This Indenture was executed by the executors only.

The husband of Mrs. *Mealy* died in 1805, and in 1808 Mrs. *Mealy* married Mr. *Hare Naylor*.

By a Settlement made on occasion of this marriage, dated the 16th *December* 1808, and which recited the will and also the deed of 1798, and in particular the trusts of that deed as above set out, Mrs. *Mealy* assigned to *N. E. Kindersley* and *T. Cockburn* and two others the annuity of 600*l.* "given and bequeathed by the will
of

of the said *John Wynch* to or in trust for her and the issue of her body" upon trust to pay the same to herself for her life for her separate use, and after her decease "upon the trusts by the will of the testator directed and declared of and concerning the same."

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In 1809 the trustees under the last-mentioned settlement filed a bill against the executors, *Mrs. H. Naylor* and her husband, and a child of the marriage then born, for the purpose of compelling the executors to vest in the English funds as much money as would produce the annuity of 600*L.*, and in this bill it was suggested that *Mrs. H. Naylor* claimed to be entitled to the annuity, not for her life only but absolutely. In the deed of 1798, and in the marriage settlement of 1808, it had been taken for granted that the annuity was for life only. The executors had refused to make the investment required in the English funds, inasmuch as it would occasion a great loss to them as the residuary legatees of the testator's estate, and they also insisted upon a right to compel *Mrs. H. Naylor* to accept her annuity from the 20,000 star pagodas in *India* according to the deed of 1798. *James Wynch* died in 1811, and *George Wynch* was his administrator. In *March* 1812, it was agreed, between *Mrs. H. Naylor* her husband the trustees and *George Wynch* the surviving executor, that upon a proper investment being made in the public funds of *Great Britain* for answering the annuity of 600*L.*, the suit instituted in 1809 should be terminated, and the bill dismissed. By Indenture dated the 23rd *March* 1812, and made between *Mrs. H. Naylor* and her husband of the first part, the trustees of the settlement of 1808 of the second part, and *George Wynch* the surviving executor of the third part, and duly executed by all parties, after reciting the various circumstances already mentioned, and that "doubts were entertained respecting

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respecting the true construction and effect of the testator's will in certain contingencies," and that it had been agreed to invest a sufficient sum in the funds of *Great Britain* for the purpose of securing the annuity upon all the trusts declared concerning the same in the will of the testator "except so far as the said trusts are altered by virtue of these presents," and after also reciting that the said *George Wynch* had accordingly invested the sum of 12,000*l.* Navy Five per Cent. Annuities in the joint names of himself and another trustee named by him and of *N. E. Kindersley* and *T. Cockburn*, it was witnessed that for declaring the trusts of the sum of 12,000*l.* Navy Five per Cent. Annuities so invested it was declared and agreed by all the parties that the trustees in whose names that sum was invested should stand possessed thereof in trust to pay the dividends thereof to *Mrs. H. Naylor* for life for her sole and separate use in satisfaction of the annuity of 600*l.* and in lieu of all interest in the 20,000 star pagodas, and after her decease to stand possessed of the capital sum of 12,000*l.* Navy Five per Cent. Annuities upon the trusts and for the intents and purposes created by the testator concerning the annuity of 600*l.* "except so far as the same trusts were varied by the assignment thereby made by *Mrs. H. Naylor* and her husband of all their interest in any event contingency or possibility in the capital sum of 12,000*l.* Five per Cent. Annuities after the decease of *Mrs. H. Naylor* whether such right or interest should vest in *Mrs. H. Naylor* and her husband in their own right or as representative of any of her children or by any other means whatsoever;" and it was thereby provided that in case *Mr. H. Naylor* should survive his wife, and the said *George Wynch* should on her death become entitled by virtue of the testator's will or otherwise for his own use to any part of the capital sum of 12,000*l.* Navy Five per Cents., then that
a sufficient

a sufficient part thereof should be conveyed to trustees in order that Mr. *H. Naylor* should receive out of the dividends an annuity of 300*l.* for his life, and Mrs. *H. Naylor* and her husband accordingly assigned to the said *George Wynch* absolutely all right and interest in the 12,000*l.* Navy Five per Cents. that might accrue to them in any event after the death of Mrs. *H. Naylor*, or in right of representation to any of Mrs. *H. Naylor's* children.

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Mr. *Hare Naylor* died in *March* 1815, and Mrs. *Hare Naylor* in 1851 (*a*). The 12,000*l.* Navy Five per Cent. Annuities had in the meantime been converted into 12,600*l.* 3*l.* 5*s.* per Cent. Annuities, and the surviving trustee of the fund, shortly after Mrs. *Naylor's* death, transferred the amount into Court under the Trustees Relief Act.

The present Petitioner, as representing *James Wynch* and *George Wynch*, claimed the fund under the trusts of the testator's will or otherwise, and that by the deed of the 23rd *March* 1812 the Petitioner was entitled to all the interest which vested in Mrs. *H. Naylor*. This claim was resisted by the surviving children of Mrs. *H. Naylor* and by the children of a deceased child, but these parties raised no question among themselves.

The

(*a*) Some time after Mr. *Naylor's* death, Mrs. *H. Naylor* filed a bill against *George Wynch*, the trustees of the settlement of 1808, the trustees of the deed of 1812, and her children, praying a declaration that, notwithstanding the deed of the 23rd *March* 1812, she took an absolute interest in the annuity of 600*l.*

under the will of the testator. The cause was heard in 1824 by the then Vice-Chancellor Sir *J. Leach*, when his Honor dismissed the bill, holding that the Plaintiff was bound by the deed of *March* 1812 (see *Naylor v. Wynch*, 1 *S. & S.* 555), and this decision was affirmed on appeal by the Lord Chancellor Lord *Lyndhurst*.

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The Petition was heard by Vice-Chancellor *Stuart* in *May* and *June* 1853, when his Honor decided against the Petitioner, holding that Mrs *H. Naylor* had only a life interest in the annuity, and that on her death her children became entitled as purchasers. A full report of the case will be found in the 1st Volume of Messrs. *Smale & Giffard's Reports*, page 427. From this decision the Petitioner appealed, and the case now came on to be heard before the full Court of Appeal.

The *Solicitor-General*, Mr. *Lee*, and Mr. *A. Smith*, in support of the Appeal.

The question here is, what interest Mrs. *Naylor* takes in the annuity of 600*l.* under the disposition contained in the will of the testator in the cause. In considering the rules of construction applicable to dispositions like that before the Court, it appears that a bequest of personal estate, in words which would give an estate tail in land, gives an absolute interest, *Chandless v. Price* (a), *Britton v. Twining* (b): this is clearly so where the gift is to *A.* and the heirs of his body; it is so also where the gift is to *A.* for life and after his decease to the heirs (or heirs male) of his body, *Tothill v. Pitt* (c), *Chatham v. Tothill* (d), *Britton v. Twining* (e), *The Earl of Verulam v. Bathurst* (f); and likewise in a gift to *A.* and his issue, *Lyon v. Mitchell* (g), *Tate v. Clarke* (h); and it has been held at law, that a devise to *A.* for life and then over to his issue gives an estate tail, *King v. Melling* (i), *Roe v. Grew* (k); the reasoning of Lord Chief Justice *Wilmut* in the latter of these cases is of great

(a) 3 *Ves.* 99.

(b) 3 *Mer.* 176; see p. 183.

(c) 1 *Mudd.* 488.

(d) 7 *Bro. P. C.* 453.

(e) 3 *Mer.* 176.

(f) 13 *Sim.* 374.

(g) 1 *Mudd.* 467.

(h) 1 *Beav.* 100.

(i) 1 *Ventris*, 225.

(k) 2 *Wilson*, 322.

great importance, and proves that the judgment was not founded upon a consideration of feudal principles, and Lord *Kenyon* often referred to the case as establishing a rule of construction applicable to such gifts. (See also *Doe d. Candler v. Smith* (a), *Jesson v. Wright* (b), and *Prior on Issue*, sects. 60, 208, 276.) Coming to the case of a bequest of personal estate to A. for life and after his decease to his issue and in default of issue (or of such issue) then over, the decision in *Knight v. Ellis* (c) is relied on upon the other side, as showing that such a bequest does not confer an absolute interest; but the authority of that case has been repeatedly questioned by text writers, (see Mr. *Belt's* note to the Report, also *Jarman on Wills*, Vol. II. p. 494, *Lewis on the Law of Perpetuity*, p. 386,) as also by Sir T. Plumer in *Lyon v. Mitchell* (d), and is inconsistent with the decided cases of *Mogg v. Mogg* (e), *The Attorney-General v. Bright* (f), *Jordan v. Lowe* (g), *Bird v. Webster* (h), *Manning v. Moore* (i), *Darley v. Martin* (k); the terms also of the gift there are different from those of the will in question. We, therefore, submit that, for the purpose of the present question, *Knight v. Ellis* must be treated as having been overruled. It is also to be noticed, with respect to the particular form of bequest and in favour of our argument of its giving an absolute interest, that the word "issue" is to be taken *primâ facie* as meaning "heirs of body;" *Doe d. Cannon v. Rucastle* (l), *Fearn's Posthumous Works*, p. 393, quoted in 13 Sim. 383, n.,

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(a) 7 T. R. 531.

(b) 5 M. & S. 95; and S. C. 2

Bl. 1.

(c) 2 Bro. C. C. 570.

(d) 1 Madd. 467; see p. 486.

(e) 1 Mer. 654.

(f) 2 Keen, 57.

(g) 6 Beav. 350.

(h) 1 Drew. 338.

(i) *Alcock & Napier*, 96.

(k) 17 Jur. 1125.

(l) 8 C. B. Rep. 876; see p. 886.

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383, n., *Kavanagh v. Morland*(a). Our argument thus is, that if the words used in the will in the present case had related to realty they would have created an estate tail, and that although if taken as relating to common personalty they would, according to *Knight v. Ellis*, have given an estate for life only, yet that decision has been overruled. We, however, further contend that, supposing the authority of *Knight v. Ellis* to remain untouched, that case does not apply to the present, the gift here not being of common personal estate, but of an annuity which is in its nature distinguishable. According to the authorities an annuity to A. and his heirs, or to A. and the heirs of his body, is a personal inheritance, an estate not entailable within the Statute de Donis, a fee simple conditional, alienable when issue had and determining with the failure of issue. (Bequests also of annuities are to be determined on the same principle as grants of annuities, *Savery v. Dyer*(b).) Thus we find, in the case of *Earl of Stafford v. Buckley*(c), that the limitation of an annuity, arising out of Barbadoes duties, to A. and to the heirs of his body, was held to be a fee simple conditional, a personal inheritance which the law allowed to descend to the heir but which had nothing to do with the realty. So also in *Turner v. Turner*(d), which was a bequest of a mere personal annuity to one and then to the heirs of his body, Lord *Loughborough* observes, "Where it is charged upon land it may be real or personal at the election of the holder: he may proceed against the land or against the person. If it is out of the coffers, it is personal only as to the remedy; but the property itself is real as to its descent to the heir. In *Buckley v. Lord Stafford* it is said, that where there

(a) 1 *Kay*, 16.(b) *Amb.* 139.(c) 2 *Ves.* 170.(d) 1 *Bro. C. C.* 315.

There is a rent-charge and out of it a new rent created, it will be a mere annuity, and will not charge the land but the person only. An annuity then, when granted with words of inheritance, is descendible; but as to its security is personal only: it may be granted in fee; of course it may as a qualified or conditional fee." We submit on these last authorities, that if there is any difference between the construction of the word "issue" as to real and personal estate, the case of an annuity will follow the rule applicable to the former. The trust for the separate use of Mrs. *Mealy* supports our view of the construction. (They referred to *Nevil's Case* (a), *Lady Holderness v. Marquis of Carmarthen* (b), *Smith v. Pybus* (c), *Taylor v. Martindale* (d), *Co. Litt.* 1 b, 20 a, 144 b, *The Doctor and Student* (18th ed.), p. 90.)

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They contended, also, that the decision in *Naylor v. Wynch* (e), had determined the present question in favour of the Appellants.

The following cases were also mentioned in the course of the argument: *Brediman's Case* (f), *Forth v. Chapman* (g), *Hockley v. Mawbey* (h), *The University of Oxford v. Clifton* (i), *Bigge v. Bensley* (k), *Jeffery v. Honywood* (l), *Dunk v. Fenner* (m), *Franks v. Price* (n), *Baggett v. Meux* (o), *Blewitt v. Roberts* (p), *Stokes v. Heron* (q), *Yates v. Maddan* (r).

Mr.

- | | |
|-----------------------|------------------------|
| (a) 7 Rep. 33 a. | (k) 1 Bro. C. C. 187. |
| (b) 1 Bro. C. C. 377. | (l) 4 Madd. 398. |
| (c) 9 Ves. 566. | (m) 2 Russ. & M. 557. |
| (d) 12 Sim. 158. | (n) 3 Beav. 182. |
| (e) 1 S. & S. 555. | (o) 1 Coll. 138. |
| (f) 6 Rep. 56 b. | (p) Cr. & Ph. 274. |
| (g) 1 P. W. 663. | (q) 12 Cl. & Fin. 161. |
| (h) 1 Ves. jun. 143. | (r) 3 Muc. & G. 532. |
| (i) 1 Eden, 473. | |

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Mr. *Rolt* and Mr. *G. M. Giffard*, for the children of Mrs. *Naylor*, submitted, that the decision of the Vice-Chancellor was correct.

As a question of construction, the decision of this case will not be affected by the nature of the subject bequeathed: the intention of the testator is, that Mrs. *Naylor* shall have the annuity for her life, and that then it shall go to her children. It is not necessary to discuss what construction would be put on the words used as applied to real estate, for the same words have a different meaning in the same will when applied to real estate from that which they have as applied to personalty, *Forth v. Chapman* (a). The cases cited to support the argument, that Mrs. *Naylor* takes an absolute interest on the ground that the gift is of an annuity, do not apply to the present case. *Earl of Stafford v. Buckley* (b) proceeded on the peculiar nature of the property possessed by the testator, and which was not the same as that with which the Court has to deal here; and *Turner v. Turner* (c) was decided upon the words of the will. With respect to the effect to be given to the word "issue," that depends on the whole tenor of the will; it is a flexible term, not so clearly a word of purchase as "children," or so much a word of limitation as "heirs," *Lees v. Mosley* (d), *Prior on Issue*, sect. 302. The decision in *Knight v. Ellis* (e) is completely in our favour, and there is no reason for saying that it has ever been overruled: on the contrary, Sir *S. Romilly* mentions it in his argument in *Britton v. Twining* (f), without disputing its accuracy,

(a) 1 P. W. 663.

(b) 2 Ves. 170.

(c) 1 Bro. C. C. 315.

(d) 1 Y. & C. 589.

(e) 2 Bro. C. C. 570.

(f) 3 Mer. 176.

racy, and Mr. *Butler*, in his note to *Fearne on Contingent Remainders*, p. 490, expressly relies on it; Lord *St Leonards* also treats it as a binding authority in his *Treatise of the Law of Real Property*, p. 237. (And see *Crozier v. Crozier* (a).) It is also to be noticed, that the gift in question is executory, and its terms are therefore to be construed as in the cases of directions to settle; it is besides a gift of income, and not of a capital fund. (They also mentioned *Clare v. Clare* (b), *Stonor v. Curwen* (c), *Aubin v. Daly* (d), *The Attorney-General v. Bright* (e), *Stokes v. Heron* (f), *Roberts v. Dixwell* (g), *Robinson v. Grey* (h).) Even assuming that Mrs. *Naylor* was entitled absolutely under the will, still the children would be entitled to take under the settlement of the 10th December 1808, for this was a disposition by Mrs. *Naylor* in their favour prior to any title in the Appellants.

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Mr. C. P. *Stewart*, for the grandchildren of Mrs. *Naylor*, and in support of the decision of the Vice-Chancellor, cited *Merest v. James* (i).

Mr. *Malins* and Mr. R. W. E. *Forster*, for the Executors of Mrs. *Naylor*, argued against the Appellants, and referred to *Procter v. Upton*, before Lord *Hardwicke* (Mr. *Coxe's* MS. (O. p. 70) in the Library of *Lincoln's Inn*),* and *Ranelagh v. Ranelagh* (k).

Mr.

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| (a) 3 <i>Dru. & War.</i> 373. | (g) 1 <i>Atk.</i> 607. |
| (b) <i>Forrester</i> , 21. | (h) 9 <i>East</i> , 1. |
| (c) 5 <i>Sim.</i> 264. | (i) 1 <i>Brod. & B.</i> 484. |
| (d) 4 <i>B. & A.</i> 59. | (k) 2 <i>Myl. & K.</i> 441; 4 <i>Beav.</i> |
| (e) 2 <i>Keen</i> , 57. | 419. |
| (f) 12 <i>Cl. & Fin.</i> 161. | |

* The following is the note of the case to which reference was made:—

Procter v. Upton (*Hill*. 12 *Geo.* 2).—Mr. *Procter*, the Plaintiff's

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father, by his will devised all his personal estate to the Defendants in trust for the benefit of his son the now Plaintiff then an infant, to be laid out in lands or stock, and if he died without issue then to one of the Defendants, and in such case gave to the other Defendant 100*l.* legacy. And now the Bill was by the Plaintiff, who is since come of age, against the Defendants who were the executors of the father's will, and thereby appointed the Defendants to be guardians to the Plaintiff till his age of twenty-five years, to account for the personal estate, and that the same might be paid over to the Plaintiff. The Defendants by their Answer insisted on the limitation over as an interest in themselves, and that the legacy of 100*l.* is a vested legacy and ought now to be paid, and that the Plaintiff is entitled to no more than the produce of this personal estate during his life. There was this further in the case, that the testator by a codicil to his will appointed the Defendants perpetual guardians to his son, and directed that his son should not meddle with or lessen the principal of what was so left unless for some particular purposes in the will, for which purposes he empowered his son to employ so much of the principal as for those purposes is allowed by the codicil.

LORD HARDWICKE (Chancellor).—This is one of those cases wherein a man hath made use of legal terms and expression without understanding the force and import of them and by that hath obscured what his intent was: but a court of justice must take things as they are, and some construction must be now made upon this will, and the standing rule of construction is to follow the intent, and the will and codicil must be considered together and as expounding one another. That part of the codicil whereby the testator appoints the Defendants perpetual guardians to the Plaintiff is to be sure a thing which can't take place: what the testator went upon in this was a part of the Roman Civil Law which allowed a father to put his children under perpetual pupillage as they might be where they became prodigal, but though this cannot take place here, it may serve to show that the intent of the testator was to restrain his son as much as possible. And I am of opinion, upon consideration of this will and codicil, that here the son is entitled to no more than the interest or produce of this estate during his life. And the power to make a jointure and appoint sums of money to his children wont enlarge or alter what is given to the Plaintiff, which is in effect determined in the case of *King v.*

The cases of *Turner v. Turner* (a), *Smith v. Pybms* (b), and *Stokes v. Heron* (c), were all decided in conformity with the principle for which we contend. The only serious point is, whether the rules which would otherwise have been applicable to the construction of bequests of personal estate have been set aside by the decision in *Knight v. Ellis* (d). Such, however, has not been the way in which the matter has been viewed, and words which if they had been applied to realty would have conferred an estate tail, have been held to give an absolute interest in personalty, gifts of realty and personalty having been considered to be governed by the same rule, except as to some particular matters, as in *Forth v. Chapman* (e), the decision in which has been misunderstood and carried further than

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was

(a) 1 Bro. C. C. 315.

(d) 2 Bro. C. C. 570.

(b) 9 Ves. 566.

(e) 1 P. W. 663.

(c) 12 Cl. & Fin. 161.

*Widling in Ventris*; and the powers given in the present case, as 300*l.* to buy a place or to settle the whole for a jointure and to appoint sums for the benefit of his children, are all powers given for particular purposes, and the intent to me plainly was to make the Plaintiff but tenant for life. As to the legacies I think them but merely contingent legacies that can't take place now at least, and are therefore immaterial to be considered. And in this case I think it makes no difference whether the estate be considered to be laid out in lands or to remain in stocks:—And decreed according to this opinion, but said, if the case had stood singly upon the will he should not have thought but that the Plaintiff would have been entitled to the whole; and said that the case of the *The Attorney-General v. Hall* (5 July, 1731) was different; for there the whole of the estate was vested in the son: the case was, a man devised all the rest and residue of his personal estate whatsoever and wheresoever, my debts legacies and funerals paid, to his son *Francis Hall* and the heirs of his body to be paid and delivered to him, and in case my said son *Francis* shall depart this life having no heirs of his body, I give all such and so much of my said estate as he shall be actually possessed of at the time of his decease to the *Goldsmiths' Company*: *Francis* the son died without issue; and a bill brought for this residuum by the Company was dismissed.

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was ever intended. The case of *Knight v. Ellis* (a), if rightly reported, was decided in forgetfulness of the change of judicial opinion, which had varied the effect of some of the earlier cases. It has been said, that the bequest in question is executory, but, supposing it to be so, though in fact it contains no executory direction, still the words of the will must be taken in their ordinary sense, there being nothing to render it necessary to modify them (b).

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The COURT now delivered judgment.

The LORD CHANCELLOR, after stating the facts of the case down to and including the bringing of the fund into Court, to the effect hereinbefore set out, proceeded as follows:—The question now to be decided is raised upon a Petition presented by the representative of *George Wynch*, claiming to be entitled to the fund in Court by virtue of the deed of the 23rd March 1812, and his contention is, that Mrs. *Hare Naylor* took an absolute interest under the will for her separate use, that *George Wynch* the surviving executor became, under the deed of 1812 a purchaser for value. This claim is resisted by the issue of Mrs. *Naylor*, including under that term her three children and six grandchildren, and they assert a title to the fund as legatees under the will of the original testator *John Wynch*. No question is raised by these parties

(a) 2 Bro. C. C. 570.

(b) In the course of the argument it was suggested, that the annuity might be a hereditament within the Statute of Uses, and the construction of the will such as to give a legal estate to the trustees for the life of Mrs. *Naylor* in trust for her, and a legal remainder to her issue, and

that the two estates being of different qualities the rule in *Shelley's Case* was not applicable. To this it was answered, that such annuities are not within the Statute of Uses; *Bacon on Uses*, pp. 43, 44 (*Rowe's* edition), and see Mr. Justice *Dodridge's* argument in *Lord Willoughby's Case*, Sir *W. Jones' Rep.* p. 120.

parties amongst themselves, and it was admitted in the argument that if they, that is the children or the grandchildren, are entitled, they have arranged as between themselves for the distribution of the fund.

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Two grounds of objection are stated to the Petitioner's claim: first, it is said that under the will the issue take as legatees by purchase; and, secondly, that, even if Mrs. Mealy took the absolute interest, still the Respondents are entitled by assignment under her.

The latter of these two points rests on this:—that, by the deed of the 8th March 1798, the executors put a construction on the will which excluded the notion of Mrs. Mealy having an absolute interest, Mrs. Mealy being at that time a married woman and not having parted with the fee, and that by the deed of the 17th December 1808, which she executed when single, she adopted this construction of the will and assigned her interest in trust accordingly, that is in trust for herself for life and afterwards for her issue; and it is said that, whatever was the real construction of the will, Mrs. Mealy, being competent to deal with the fund if it was her own, put a construction upon the will, and assigned the fund, so that it must now go just as it would have gone if, according to the true construction of the will, she had only been tenant for life with remainder to her children. I think there is very great force in this argument, but I have not thought it necessary to make up my mind finally upon it, my opinion being that she did not take an absolute interest, but that she took for life only with a gift in the nature of a remainder to her issue.

There is a point which one of the Lords Justices thinks entitled to great weight, and which I will here mention



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mention merely to state that, though I give no opinion upon it, I have no opinion upon it adverse to that which will be expressed by my learned Brother; it is this, that it is open to doubt whether, under the will, the estates of Mrs. *Mealy* and her issue were not the one equitable and the other legal, in which case there could be no union, and the rule in *Shelley's Case* would not apply. My decision, however, of the question raised on the present Petition proceeds on general grounds; and I do not think, even if the estates were the same, that is, both legal or both equitable, that there was an absolute interest in Mrs. *Mealy*.

The authorities I must observe on this subject are very far from satisfactory, and the principles on which they have gone have not, I think, in many cases been such as were strictly applicable to questions of this sort. Rules drawn from principles of tenure have been adopted as canons of construction where tenure is out of the question, though, in the great bulk of the cases, the intention has been thereby defeated. Where, however, I find a rule established, I will not question it or inquire very narrowly as to its origin, but the point is, whether the authorities which give an absolute interest in personalty to the first taker do govern this case, that is to say, whether this is a case in which I am bound by authority to hold that words expressing a gift to the issue are words of limitation and not words of purchase: I think I am not so bound.

The first class of cases is that, in which the gift, after the gift to the first taker, is to the heirs of the body. In those cases the Courts have held, on analogy to devises of real estates, that the words are so clearly words of limitation, that even the express restriction of the first bequest to a life estate is not sufficient to exclude their

prima facie meaning. Such was the case of *Tothill v. Pitt(a)*, which afterwards came before the House of Lords: there the gift was in this form,—the testator gave to Sir *William Pynsent* for his life the dividends of 4,000*l.* Bank Stock and the yearly income of certain Exchequer Annuities, and after the death of Sir *William Pynsent* he gave to *Leonora Ann Pynsent* the dividends on the Bank Stock and the payments growing due on the annuities during her life, he then gave her two estates at *Putney* to keep sell or dispose of as she pleased, and after her decease he gave all the aforesaid lands Bank Stock and Exchequer Annuities to the “heirs male of her body and for want of such issue” he gave all the said estates Bank Stock and Annuities to the Plaintiff by the name of *William Daw*: it was a gift, therefore, as far as the Bank Stock was concerned, of the dividends to her for her life, and after her decease to the heirs male of her body, it was expressly to her for life and afterwards to the heirs male of her body and for want of such issue then over. The principle is too well recognized to need any illustration that giving the dividends was just the same as giving a life interest in the fund, and thus the gift was of the fund to the legatee for her life and then to the heirs male of her body and for want of such issue over; and what was decided was, that she took the absolute interest in the Bank Stock: the Master of the Rolls, Sir *Thomas Sewell*, before whom the cause was heard, came to that conclusion, for he says, “There is no doubt but that the intention ought to prevail if it can be enforced without breaking in upon any rule of law, and this resolves itself into a question of construction, but the rule that words which would give an estate tail in a freehold are to be considered in the case of chattels as giving the thing

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(a) 1 *Madd.* 488; *S. C.* in the House of Lords, 7 *Bro. P. C.* 453.

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thing absolutely, for that no chattels can be limited over after a dying without issue, this rule is too strong to be got over;" that was the decision of the Master of the Rolls, and though it was reversed by the Lords Commissioners, it was eventually sustained in the House of Lords. Just on the same principle was decided the case of *Elton v. Eason* (a): the gift there was this,—the testatrix left all her monies and effects whatsoever and wheresoever to hold to trustees their heirs executors administrators and assigns upon the following trusts subject to her debts legacies &c., "to apply the residue of the rents and profits of my estates and effects for my son during his life and afterwards for the heirs of his body if any:" Sir *William Grant* held that to be an absolute interest in the first taker, and his expressions are (b), — "Whatever disposition would amount to an estate tail in land gives the whole interest in personal property which is incapable of being entailed," and subsequently, "the words, 'if any,' have no restrictive effect and then it is a mere limitation over after a general failure of heirs of the body which the rules of law will not permit to take effect." There was another case before the same learned judge, of *Britton v. Twining* (c): there the testator gave 20,000*l.* to an infant which he would have "so secured that he may only receive the interest of the same during his life and after his decease to heir male of his body and so on in succession to the heir at law male or female." Although here again there was an express restriction for life, Sir *William Grant* held that the first taker took an absolute interest. In these cases, the principle on which the Courts went was this, that technical words were used which indicated a clear meaning on the part of the testator that the property should go in a course of

(a) 19 *Ves.* 73.    (b) 19 *Ves.* 78—80.    (c) 3 *Mer.* 176.

of devolution till there was an exhaustion of the heirs of the body, and as that of course could not be carried into effect, they gave an absolute interest.

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In the cases just mentioned the words were "heirs of the body," which, as we know, are technical-words almost mysteriously inflexible, but in cases also where the more manageable expression "issue" occurred, still, where there was nothing to show that the word was not intended as a word of limitation, or an intention to confine the first taker to a life estate, it has been held to be in the nature of a word of limitation when used with reference to personal estate equally with the words "heirs of the body." Such was the case of *Lyon v. Mitchell* (a): there the testator gave the rest of his estate real and personal whatsoever and wheresoever and of what nature or kind soever unto his executrix and executors upon trust to pay certain legacies to his daughters and an annuity to his wife, and the residue he directed "to be divided equally amongst his sons *John Lyon Edmund P. Lyon Benjamin Lyon and George Lyon* and such son and sons as his wife should or might be esient of at the time of his death or at any time during his life if such son and sons shall be born alive share and share alike as tenants in common and to the issue of their several and respective bodies lawfully begotten:" Sir *Thomas Plumer* held that here in the word "issue" there was nothing to show that it was not intended as a word of limitation, that the meaning must be taken to have been that in spite of an express life estate given to the first taker, an interest was to devolve from time to time to all the issue so that the first taker must be held to have had an absolute interest, that the word "issue" must be considered as incorporated

(a) 1 *Madd.* 467.

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rated into and forming part of the gift to the first taker, and not as amounting to a subsequent gift to the issue.

So again, where there is no express gift to the issue, but after an indefinite gift there is a gift over in default of issue to the first taker, there the first taker in the case of real estate is considered by implication to take a gift to him and his issue, and the same rule has been adopted with regard to personalty. Thus, in the case of *Chandless v. Price(a)* where the gift was thus, "the rest and residue of my real and personal property of what kind or nature soever I give and bequeath in failure of legitimate issue by my daughter *Mary Williams* to my daughter in law *Catherine Jennings* and after her decease without legitimate issue to *Sarah Medhurst* wife of *Granville Medhurst* for her sole use and to be divided equally after her death between her children," it was held that, an absolute interest was vested in *Mary Williams*: it was just the same, whether done by implication or expressly, as if the gift had been to the first taker *Mary Williams* and her issue. In that case, however, and in similar cases, no such rule of construction need perhaps be resorted to, for as the gift to the first taker without more would carry an absolute interest, the subsequent gift on an indefinite failure of issue was necessarily void for remoteness.

In all these cases the rule applied to real estates derived from principles of tenure has been made the foundation of the rule for construing bequests of personalty, but in all either the technical words "heirs of the body" have occurred, or there has been nothing to show that the words, "issue," "children," or the like, have not been intended merely to define or explain the extent of

(a) 3 Ves. 99.

of the interest given to the first taker ; and I see nothing in these decisions compelling me to hold that where technical words are not used, and where the interest of the first taker is expressly confined to the life estate, I am bound to act in the construction of the bequest of personalty on principles derived from laws of tenure, and not resting on intention. It was on this distinction that Lord *Thurlow* acted in the case of *Knight v. Ellis*(a) : there the testator directed certain rents to be accumulated till his grandnephew should attain his age of twenty-one years, and after that event he gave the interest of that accumulated fund to his grandnephew for his life, and after his decease he gave the fund to his issue male and in default of such issue to his the testator's three nieces ; it was argued that, as this would have been an estate tail in real estate, it was an absolute interest in personalty, but Lord *Thurlow* held otherwise ; he gave effect to the manifest intention, not thinking himself fettered by the analogy of a real estate, where the result would have been arrived at on principles not founded on intention, but often operating in direct opposition to it. I cannot consider that case as having been overruled ; I believe it to have been rightly decided ; and at all events, if it was wrongly decided, I think it can only be questioned in the House of Lords.

I am aware that there have been three decisions by Lord *Langdale*, and one by the present Vice-Chancellor *Kindersley*, which are supposed to have treated the case of *Knight v. Ellis* as not being law. The first of these is *The Attorney-General v. Bright*(b), before Lord *Langdale* in the year 1836 :—there a sum of 500*l.* was given to *Susan Thomas* daughter of *Joseph Thomas* to receive the interest during life and then to her issue

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(a) 2 Bro. C. C. 570.  
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(b) 2 Keen, 57.

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but in case of her death without issue the said 500*l.* stock to be divided between her father's children by his second wife; it seems that in that case *Knight v. Ellis* was cited, but the judgment is so extremely short that what the grounds were on which Lord *Langdale* proceeded it is very difficult to discover: the judgment is,—“The Master of the Rolls held that the effect of the gift of the sum of 500*l.* stock to *Susan Thomas*, to receive the interest during her life, and then to her issue, was to give her an absolute interest in that sum, and that such absolute interest was not affected by the subsequent words of the will, the limitation over in case of her death without issue, unrestricted by any words limiting the generality of the expression “without issue,” being void for remoteness.” If this judgment went on the ground that *Knight v. Ellis* was not law, I confess I do not think, considering how shortly it is given and how little is said on the subject, that it would be safe to treat it as having overruled a decision which was come to half a century before, after great deliberation, it having been evidently well considered by Lord *Thurlow*, a decision too on the faith of which many cases may have been dealt with, and a great deal of money disposed of.

The next case, that of *Tate v. Clarke*(a), occurred a few years afterwards, and I am not at all clear that I should not have entirely agreed with Lord *Langdale* upon it; *Knight v. Ellis* was not referred to; it was a gift of real estate “unto and amongst all and every my brothers and sisters who shall be living at the time of the decease of my wife and to their issue male and female after the respective deceases of my said brothers and sisters for ever to be equally divided between and amongst them;” and the testator gave the interest of certain

(a) 1 *Beav.* 100.

certain money in the funds to trustees "upon trust to pay and apply the same unto my said brothers and sisters in the same manner as it is directed with regard to the rents and profits of my freehold estate," that is, it was a gift of personal estate to trustees on trust to pay over the profits to all and every his brothers and sisters who should be living at the time of the decease of his wife and to their issue male and female after the respective deceases of his said brothers and sisters for ever. I am not at all satisfied that I should not have come to the same conclusion as the Master of the Rolls did, because the word "issue" may be meant as a word of limitation in respect of personal estate as well as of real estate, and the expression, "to their issue male and female after the respective deceases of my said brothers and sisters for ever," strongly showed that was the meaning of the testator; the words were there used as indicating the extent of the interest which was given to the first taker, and I do not think the case at all irreconcilable with that of *Knight v. Ellis*.

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There was another case also before the same learned Judge, of *Jordan v. Lowe* (a) in 1843: there some leaseholds were given to trustees to suffer the testator's cousin "*Robert Jordan* son of my uncle *Jonathan* to hold and enjoy or to receive and take the rents issues and profits thereof to his own use and benefit during the term of his natural life and from and immediately after the decease of the said *Robert Jordan* then I direct my said trustees to pay the rents and profits thereof to his issue male lawfully begotten severally and respectively according to their respective seniorities;" the report of that case is extremely short, no argument at all is given, and I was going to say no judgment, for it

(a) 6 *Beav.* 350.



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it is merely this,—“The Master of the Rolls was of opinion, that the Plaintiff took a quasi estate tail, and said he must make a decree in favour of the Plaintiff according to the prayer of the bill.” Upon what grounds Lord *Langdale* proceeded we are left in entire ignorance, but it may be that he thought there that the words were to be treated as words of limitation, as the direction was to pay to the issue in succession, according to their respective seniorities, and if this was the ground of the judgment, the decision would not be inconsistent with *Knight v. Ellis*.

With regard, however, to all these cases, I am of opinion, with all deference to the very learned Judge by whom they were decided, that the judgment of Lord *Thurlow* cannot be properly considered as overruled by them even if they were inconsistent with that judgment.

The only other case is that of *Bird v. Webster* (a), before the Vice-Chancellor *Kindersley* last year: there the language was to invest “in the public funds 1,000*l.* in each child’s name and 1,000*l.* in my wife’s the interest to be received by them regularly for their life and afterwards to their descendants except my wife’s which is at her death to be sold out and divided among them.” There was, in truth, no decision touching the present question, but the Vice-Chancellor, from some expressions which fell from that very learned Judge, would seem to indicate that he thought it clear that in every case where there would be an estate tail in real estate, there would be an absolute interest in personalty: what he says in his judgment is this (b);—“The will then proceeds, ‘the interest to be received by them regularly for their life’ . . . Then comes the expression on which

(a) 1 *Drew.* 338.

(b) 1 *Drew.* p. 340.

which the question in this case turns, 'and afterwards to their descendants.' Now, if the will stopped there, if there were no more, I should be bound to come to the conclusion contended for by the Petitioners, for where there is a gift to A. for life, remainder to the descendants of A., it is clear that if real estate it is an estate tail, if personal estate it gives him the absolute interest: but this is not all:" and then he goes on and reasons upon it, but no decision upon the point is actually come to. I take this rather as an indication of the learned Judge's opinion being unfavourable to the conclusion in *Knight v. Ellis*, he does not reason upon it and say that he would not act upon *Knight v. Ellis*, but indicates an opinion that the distinction there taken was not sustainable. I do not, however, think that that decision can be so disposed of. In *The Attorney-General v. Bright* no reasons were given, the other two cases before the Master of the Rolls are perhaps distinguishable for the reasons I have mentioned, and in *Bird v. Webster* before the Vice-Chancellor, though the language used by his Honor goes further, the decision was only that the children took defeasible interests, and *Knight v. Ellis* was not cited, the case is therefore not one on which I can act in opposition to such a decision as that of Lord *Thurlow*.

I have been assuming that the case of *Knight v. Ellis*, if it be good law, governs the present, but I do not forget that this was denied in argument by Mr. *Lee*; he admitted the authority of *Knight v. Ellis*, but contended that it was a case which did not rule the one now before us; to this, however, I cannot agree. The gift is to *Anna Maria Mealy* for her life and the issue from her body lawfully begotten, and it is true that the words "and after her decease" which occur in *Knight v. Ellis* are not found here, but I think they are necessarily

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sarily implied. The meaning is plain, that the legatee shall enjoy the annuity for her life, which means for her life only, and "then," which must mean when her life interest is over, that it shall go to the issue. I can discover no sort of distinction between the two cases, nor do I think that there is any distinction arising from the gift here being of an annuity and not of a mere personal fund. I will assume the Petitioner to be well founded in his proposition, that this is an annuity that would pass to the heir and not to the executor; but I think that is not material: the question is, by what rules are the words by which it is given to be construed: is the Court to act on rules having their foundation upon and springing from principles of tenure, or is it merely to look at the language used in order to ascertain the intention of the giver. I think that, even assuming this to be an annuity passing to the heirs, still the feudal reasons have no place in determining the meaning of the words used in creating or disposing of it, and that it is still personal estate to be governed by the same rules which regulate the construction of other dispositions of personalty.

I have, therefore, come to the conclusion, that the construction put by the Vice-Chancellor on this will was correct, and that his Honor's order must be affirmed, except that a provision must be made for paying the 600*l.* annuity to the issue out of the dividends and corpus of the fund according to the arrangement that they have made among themselves.

*The LORD JUSTICE KNIGHT BRUCE.*

The Respondents who claim to be interested in the present controversy have no dispute or difference among themselves, and desire merely that, to the exclusion of the Appellant, or at least in preference to his claims,  
the

the cash and stock in question, and the future dividends of the stock, shall be subjected as from the death of the late Mrs. *Hare Naylor* to the payment of 600*l.* per annum to those Respondents, or one or more of them, until the exhaustion in that way of the entire fund (both capital and income), or the death of the survivor of the children and grandchildren of Mrs. *Hare Naylor's* second marriage who were living at her death, whichever event shall first or alone happen. This, however, is asked without prejudice to any question of right after the happening of either event. And as it is clear that to the Respondents claiming to be interested, and the Appellant or some or one of them, the whole stock and cash absolutely belong, it is only necessary for us to decide two points, or one of them. First, were the words "issue from her body lawfully begotten," contained in Mr. *Wynch's* will, words of limitation or of purchase? Secondly, if they were words of limitation, what is the effect of the deeds of 1798 and 1808 taken together? And it is upon the latter of these two points alone that I propose stating my opinion, the view which I take of that, rendering it, as I conceive, in the circumstances that I have mentioned, unnecessary for me to deal with the other. I think it a correct and just inference from the materials before the Court, that the marriage between Mr. and Mrs. *Hare Naylor* took place under the belief and in the understanding on their part that the true construction and effect of the will of Mr. *Wynch*, as to the annuity of 600*l.* per annum given by it, were such as mentioned in the deed of the 8th of May 1798, and such accordingly as to confer an interest in that annuity, and a right to it after Mrs. *Hare Naylor's* death upon her issue, if any, living at her death, at least so long as any child or descendant of Mrs. *Hare Naylor* living at her death should be in existence, if not more extensively. It must, I conceive, be taken that the

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the conduct and arrangements of Mr. and Mrs. *Hare Naylor*, preliminary to their marriage, were regulated or influenced by that belief, by that understanding; and it appears to me that their marriage settlement, the deed of the 16th of *December*, 1808, contains what is in effect tantamount to a declaration upon their part and a contract between them that the will of Mr. *Wynce* as to the annuity was to be so construed practically and should be so acted upon. From this declaration from this contract, it was, I apprehend, impossible for either of them after their marriage to recede, at least to the prejudice of any issue of their marriage living at Mrs. *Hare Naylor's* decease, whether their construction of the will was accurate or inaccurate, as to which I have said that I mean to assert nothing. And, there being now alive children of the marriage as well as grandchildren of the marriage who were living at Mrs. *Hare Naylor's* death; there being no dispute among the Respondents on this occasion, who include all the issue of the marriage living at Mrs. *Hare Naylor's* decease, nor a question raised between any of them and the only point that we are asked to decide being I repeat, whether the Appellant has any interest, and what interest, if any, he has in the fund the subject of contention, the correct conclusion I apprehend to be that the stock, its income from the death of Mrs. *Hare Naylor*, and its future income, are chargeable either primarily or exclusively (after paying the costs given by the order under Appeal and the Respondents' costs of this petition) with the payment as from Mrs. *Hare Naylor's* death of 600*l.* per annum to the Respondents claiming to be interested, or some or one of them, until the exhaustion by these means of the property thus charged, or at least until the death, if happening sooner of the survivor of Mrs. *Hare Naylor's* children and grandchildren living at her death. I think accordingly—  
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**that** our order should provide for this, but should be **with**out prejudice to any question as to the right to such **por**tion, if any, of the property as may still remain un-**ex**hausted at the death of the survivor of those children **and** grandchildren, and should be without prejudice **also** to any claim of the Respondents, or any of them, **under** the will of Mr. *Wynch*, in the event of the ex-**hau**stion taking place before the death. Practically, **there**fore, and in effect, my manner of viewing the case, **and** proposed mode of dealing with it, seem to be scarcely **or** not at all more favourable to the Appellant than are **those** of the Lord Chancellor.

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*The* LORD JUSTICE TURNER.

This case presents to our consideration questions of great difficulty, both upon the construction of the will of the testator, and upon the effect of acts which were done or concurred in by Mrs. *Naylor* after the testator's decease. I allude particularly to the deeds of 1798 and 1808, to which my learned brother has particularly referred; I allude to those deeds, however, only for the purpose of stating that I desire it to be understood that I neither assent to nor dissent from the conclusions which have been drawn from them, and that I give no opinion as to their operation or effect, but that my judgment in this case rests entirely upon the construction of the will.

The testator, who was an officer in the *East India Company's* service, by his will, after directing payment of his debts and giving some legacies to servants, has proceeded as follows :—"Item, I will and bequeath to my good and virtuous friend *Anna Maria Mealy*, now wife of *Ridgway Ridgway Mealy*, Lieutenant and Fort-Adjutant, of *Vellore*, in the Honorable Company's service, an annuity of 600*l.* sterling per annum, to commence  
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six months after my decease, for her life, and the issue from her body lawfully begotten, in failure of which it revert to my heirs ; and I have to request, that my very good friends *Nathaniel Edward Kindersley* and *Thomas Cockburn*, Esquires, will act as trustees for the said *Anna Maria Mealy*, so that the said annuity may be secured for her sole use and benefit, and that it may be paid to her quarterly or half-yearly as they may deem proper. Item, I also leave and bequeath to the aforesaid *Anna Maria Mealy* the sum of 1,000*l.* sterling, (as to enable her to pay her passage to Europe,) and request my executors will not delay paying this sum. Lastly, I will and bequeath after all the above have been executed, to my brothers *George* and *James* the residue of my estate, real and personal ; and I hereby appoint and nominate my brothers *George* and *James* my sole heirs and executors, and I have no doubt but they will see this my last will and testament put in execution agreeable to its true meaning without squabbling or disputing."

*Mrs. Mealy*, the annuitant to whom and to whose issue this annuity of 600*l.* is given, was and is mentioned in the will the wife of Lieutenant *Mealy*. She had no issue by him ; but she survived him, and after his death married Mr. *Naylor*, by whom she had issue. She has lately died, and her issue have survived her and are still living. That the annuity is so given as to endure so long as there shall be issue of *Mrs. Mealy* afterward *Mrs. Naylor* admits of no question. The question upon the construction of the will which we have to determine is, whether *Mrs. Mealy* took the absolute and entire interest in the annuity, or took the annuity for life only.

If this question had to be determined upon the language

guage of the will merely, without reference to any rules of law or to any decided cases, no doubt could, I think, be entertained upon it. The limitation of the annuity to Mrs. *Mealy* for life would of itself be sufficient to show that it was intended to be given to her for life, and for life only, and the intention would decide the question; but it was argued, on the part of the Appellant, that this annuity partakes of the character of real estate, that it is descendible to heirs, that a conditional fee may subsist in it, although it is not capable of being entailed, not being within the statute *de donis*. That it ought, therefore, in construing this will, to be considered as real estate, and that, so considering it, Mrs. *Mealy* took a conditional fee in the annuity, which became absolute in her upon the birth of issue, and it was further argued on the Appellant's behalf that, under a devise of real estate, couched in the terms in which this annuity is given, Mrs. *Mealy* would have been tenant in tail, and that the rule of this Court is, that the same words which would create an estate tail in realty confer the absolute interest in personalty, and, therefore, that, taking this annuity to be personal estate, Mrs. *Mealy* equally took an absolute interest in it.

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Admitting, however, that this annuity partakes of the character of real estate, and would descend, and may be limited in the manner pointed out, it does not, as I apprehend, follow that, in construing this will, it ought to be considered as real estate. It is, in fact, personal estate, with peculiar incidents belonging to it in that character; *Aubin v. Daly* (a); and, to treat it as real estate for the purposes of construction, would be to disregard its nature and pay regard only to its incidents. Both the nature and incidents of the property must, no doubt

(a) 4 B. & A. 59.



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doubt be considered in determining the construction of the will. The incidents can no more be disregarded than can the nature of the property. Due weight must be given to each, but this branch of the argument cannot, I think, be carried further.

We come then to these further questions—first, if this had been a devise of real estate, would Mrs. *Mealy* have been tenant in tail of the devised estate; and, secondly, assuming that under a devise of real estate in the terms of this will Mrs. *Mealy* would have been tenant in tail, does it or not follow that she became entitled to an absolute interest in this annuity.

The first of these questions was not very fully discussed at the bar in the argument on the part of the Respondents, but it is plainly a question of great importance to their interests, for if it shall appear that Mrs. *Mealy* would not have been tenant in tail of real estate devised in these terms, there can be no foundation for the Appellant's contention that she was entitled to an absolute interest in this annuity. This question, as I view it, depends wholly upon the construction of the will, and upon this point, whether the estates of Mrs. *Mealy* and of her issue are to be held to be both legal or both equitable, in which case they would coalesce; or whether the one estate is to be held to be equitable and the other legal, in which case there would be no coalition. That there would be a coalition of the estates, and that Mrs. *Mealy* would be tenant in tail, if the case rested upon the devise to her for life and her issue is, I think, established by the cases cited on the part of the Appellant; and the question therefore depends upon what is the effect of the ulterior clause contained in this will—"And I have to request that my good friends *Nathaniel Edward Kindersley* and *Thomas Cockburn*

*Cockburn* will act as trustees for the said *Anna Maria Mealy*, so that the said annuity may be secured for her sole use and benefit, and that it may be paid to her quarterly or half-yearly, as they may deem proper." It is evident from this clause that the intention of this testator was not only that there should be trustees of the interest taken by *Mrs. Mealy*, but that her enjoyment of that interest should be controlled by the discretion of the trustees. The trustees were to secure the interest for her separate use, and what she took was to be paid to her half-yearly or quarterly, at their discretion. How were these purposes to be accomplished if the legal interest in the property given was to remain in *Mrs. Mealy*. It would seem therefore that the testator must have intended that during *Mrs. Mealy's* life the legal interest should vest in the trustees. It is true that there is not in terms any gift to them; but, if it be clear that the testator intended that they should take, it is not, as I apprehend, material that there is an absence of the mere words of gift. The cases of *Oates v. Cooke* (a) and *Trent v. Hanning* (b) are, I think, sufficient to establish that proposition. It may be said that those cases are distinguishable from the present, inasmuch as in those cases there was no other devise of the estate, but in the present case there is a devise to *Mrs. Mealy*. I do not think, however, that this alters the case. The question is one of intention; and if the intention be plain, as in this case it appears to me to be, that the express devise was intended to pass the beneficial interest only, effect must, as I conceive, be given to that intention. The case of *Doe v. Woodhouse* (c) seems to me to support this view. In my opinion, therefore, under a devise of real estate in the terms

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(a) 3 Burr. 1684.

10 Ves. 495; 7 East, 95.

(b) 1 Bos. & Pul. N. R. 116;

(c) 4 T. R. 89.

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terms used in this will, the interest of Mrs. *Mealy* during her life would have been equitable merely. Would then the interest of the issue have been equitable also? I think not; for I take the general rule to be that the duration of the estate of trustees is to be measured by the purposes of the trust, and the purposes of this trust would not require that the estate should remain in the trustees beyond Mrs. *Mealy's* life; and, independently of any general rule, I think that it plainly appears from this will that the estate of the trustees was created only with a view to the life estate, and was not intended to continue after its determination. It was said, however, that Lord *Lyndhurst* decided this point, as to the coalition of the estates in his judgment upon the appeal in *Naylor v. Wynch*, and I should of course be disinclined to differ from so high an authority; but I have more than once read Lord *Lyndhurst's* judgment with much attention, and I am satisfied that it imports no more than that whatever Mrs. *Naylor* took she took for her separate use, leaving it wholly undecided what she took; a question which, upon the facts under Lord *Lyndhurst's* consideration, it was quite unnecessary for him to decide.

This being the conclusion at which I have arrived upon the question whether Mrs. *Mealy* would have been tenant in tail of real estate devised in the terms of this will, it is not material for me to state my opinion upon the question whether, if Mrs. *Mealy* would have been tenant of the real estate so devised, she would therefore have been entitled absolutely to this annuity; but I am prepared to state my opinion upon that point also. This case cannot, I think, be distinguished from *Knight v. Ellis* (a), and it lies upon the Appellant therefore to show

(a) 2 Bro. C. C. 570.

show that *Knight v. Ellis* either has been overruled or ought to be overruled. No case has been cited in which it has been expressly overruled, nor has any decision by a judge of equal authority been produced which is, in my opinion, inconsistent with it. There are indeed cases decided by the late Master of the Rolls which strongly indicate the opinion of that learned judge to have been that words which would create an estate tail in realty would operate to give the absolute interest in personality, and at least one of those cases, I mean *The Attorney-General v. Bright (a)*, is not perhaps reconcilable with *Knight v. Ellis*. There is also a case before the Vice-Chancellor *Kindersley*—I refer to the case of *Bird v. Webster (b)*—in which he expressed his opinion to be that under a gift of personality to A. for life, and afterwards to his descendants, A. would take the absolute interest, as he would have taken an estate tail in realty; but neither in the cases before Lord Langdale, nor in that before the Vice-Chancellor *Kindersley*, were the authorities subsequent to the case of *Knight v. Ellis* so fully entered into as they have been in the argument before us. It seems in those cases rather to have been assumed than established, that the authorities subsequent to *Knight v. Ellis* had settled the point. On examining those authorities, however, I do not think that this is by any means the case. In some of them, as in *Lyon v. Mitchell (c)*, the limitation has been to A. and his issue, and in default of issue over; and A. has taken absolutely, because the limitation in default of issue showed that the gift was meant to extend to all the issue, and all the issue might not be capable of taking jointly with the parent. In others of these authorities, as in *Chandless v. Price (d)*, the gift has

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(a) 2 Keen, 57.

(b) 1 Drew. 838.

(c) 1 Mudd. 467.

(d) 3 Va. 99.

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has been to A., and in default of issue of A. over; and here again A. has taken absolutely, there being no gift to the issue, and no other means by which the gift could reach them. Again in others of these cases, as in *Britton v. Twining* (a) and *Elton v. Easen* (b), the gift has been to A. for life, and after his decease to the heir male or heirs of his body, and A. has taken absolutely; the technical words "heir male" and "heirs of the body" importing inheritance from the ancestor. And again in others of these cases, as in *Mogg v. Mogg* (c) and *Dunk v. Fenner* (d), the real and personal estate have been made subject to the same limitations, and the disposition of the personal has been governed by that of the real, which however is not always the case. *Hockley v. Mawbey* (e) was also a case in which the real and personal estate were made subject to the same terms, and in that case too the gift was to the son and his issue, and in default of issue over. These cases therefore are distinguishable from *Knight v. Ellis* (f), and cannot, I think, be said to overrule it. The observations of Sir T. Plumer, in *Lyon v. Mitchell* (g), tend no doubt to impeach the case, but on the other hand it has been cited in other cases without disapprobation. The case is said to be impeached also by the dicta, to be found in many of the authorities upon this subject, that the same words which would create an estate tail in realty would give the absolute interest in personalty; but these dicta were not pointed to the case of *Knight v. Ellis*; and if taken in their full sense, and, as pronounced, they stand without qualification, they certainly go beyond what the authorities would warrant. I may observe also, that in the late case of *Darley v. Martin* (h), the

Court

(a) 3 Mer. 176.

(e) 1 Ves. jun. 143.

(b) 19 Ves. 73.

(f) 2 Bro. C. C. 570.

(c) 1 Mer. 654.

(g) 4 Mudd. 467.

(d) 2 Russ. &amp; Myl. 557.

(h) 17 Jur. 1125.

Court of Common Pleas did not treat the case of *Knight v. Ellis* as overruled, though the point was open before them; they decided the case upon a different ground. I think therefore the case of *Knight v. Ellis* cannot be said to have been overruled. We come then to the question whether it ought now to be overruled. The question in effect is, whether, admitting that under a disposition of real estate in the terms of this will the word "issue" would be construed as a word of limitation, it is therefore to be so construed in this disposition applying to personal estate. Is this Court, in construing a disposition by will of personal estate, to be absolutely governed by the rule which would be applied at law in the case of real estate? Before arriving at such a conclusion it is, I think, our duty to consider upon what foundation the rule of law proceeds, and whether it rests upon a foundation at all applicable to personal estate. The rule of law which construes "issue" as *primâ facie* a word of limitation rests, as I apprehend, upon one or other of these foundations; it is either derived from the old law, which upon feudal principles was much directed against the successors to real estates taking otherwise than by descent, or it rests upon the ground that the word issue taken *per se* includes all the issue, and that the best mode of effectuating the intention in favour of all the issue is to give an estate tail to the parent, which, in the course of devolution would embrace them all. Surely a rule resting upon such foundations can have no application to personal estate. The feudal principle does not reach to the subject matter, and so far from the application of the rule to personal estate effectuating the intention, it directly and immediately defeats it, for it gives the absolute interest to the parent, and prevents the issue *qua* issue taking any benefit under the disposition. It is said, however, that different effect ought not to be given to the same words

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as applied to real and to personal estate. But the subject matters are wholly different. The real estate is capable of entail, the personal not, and I can see no reason why a testator, using the word issue with reference to property which is not capable of being entailed, is to be considered to have had the same meaning as if he had applied the word to property which may be entailed. It is, indeed, settled by *Forth v. Chapman* (a), that the same words may receive a different construction as to real and personal estate, and it would, I think, be difficult to find a case to which that authority could be better applied than to the case before us. The great principle in all cases upon the construction of wills is, that the intention of the testator is to be carried out as far as it is consistent with the rules of law, and I am satisfied that the construction put by Lord *Thurlow* upon the will in *Knight v. Ellis*, was much more conformable to the testator's intention than the construction which has been contended for in the present case. I am not, therefore, inclined to dissent from the case of *Knight v. Ellis*, and at all events I am fully prepared to say with the Lord Chancellor, that, if it is to be overruled, it must be by higher authority than any which I possess. It is not a case which stands by itself. There are older authorities to the same effect, among which I may mention *Clare v. Clare* (b), and *Warman v. Seaman* (c).

It was contended on the part of the Appellant, that, the property in question in this case being a perpetual annuity, the decision in *Knight v. Ellis*, even if supported, would not apply, and the case would be governed by *Stafford v. Buckley* (d), but, although the nature of the

(a) 1 P. Wms. 663.

(c) *Finch*, 279.(b) *Cas. temp. Tulb.* 21.(d) 2 *Ves. sen.* 170.

the property might prevent it from being entailed, it would, if *Mrs. Mealy* took a conditional fee, vest in her absolutely upon the birth of issue, and I think, therefore, the nature of the property does not vary the case, and *Stafford v. Buckley* does not apply, for in that case the word issue was clearly explained by the context to mean heirs of the body. It is remarkable, however, that even in that case Lord *Hardwicke* reserved the question between the tenant for life and the issue as to the general personal estate. That case, however, opens a question as to the extent of the rights of the issue, which it is not now necessary to decide, and which, indeed, is not now ripe for decision; and I think, therefore, that the fund cannot be paid out as directed by the order, but the 600*l.* a year must be paid to the issue.

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NOTE.—See *Goldney v. Crabb*, 19 *Beav.* 338.



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July 15.

Nov. 4.

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Jan. 11, 19.

Before *The*  
*Lord Chan-*  
*cellor, LORD*  
*CRANWORTH.*

After judg-  
ment of ouster  
upon an in-  
formation in  
the nature of a  
quo warranto  
against a per-  
son returned  
by the sheriff  
as duly elected  
to the office of  
coroner, a new  
writ de coro-  
natore eli-  
gendo issues  
as of course,  
and, *held*, to be  
no ground for  
withholding  
the writ, that  
the judgment  
of ouster was  
founded upon  
the fact that  
the votes con-  
stituting the  
majority for  
the person re-  
turned were  
bad, and  
though it was  
alleged on  
oath that the  
result of a  
scrutiny would  
be to place the  
opposing can-  
didate in a  
majority.

*In re* The Coronership of HEMEL HEMPSTEAD.

**T**HIS was the petition of certain freeholders of the district of *Hemel Hempstead*, in the county of *Hertford*, and it prayed that a new writ might issue for the election of a coroner of that district, under the following circumstances:—It appeared that in *May* 1852, a writ de coronatore eligendo issued for the election of a coroner of the above district. In obedience to that writ the sheriff held a court on the 4th *June* 1852, when the election was proceeded with. *Mr. Day* and *Mr. Pope* submitted themselves as candidates for election. Upon that occasion *Mr. Day* was returned by the sheriff as duly elected. The votes of a large body of electors who voted for *Mr. Day*, but for which votes *Mr. Pope* would have had the majority, were formally objected to by *Mr. Pope*, and a scrutiny demanded; but the objection was disregarded, and the scrutiny refused by the sheriff. In *June* 1854, upon an information in the nature of a quo warranto, judgment of ouster was pronounced by the Court of Queen's Bench against *Mr. Day*, on the grounds that the electors objected to were not qualified.

On the 15th *July* 1854, an application was made *ex parte* on behalf of *Mr. Pope* to the Lord Chancellor, to suspend the issuing of a new writ de coronatore eligendo, and to direct the return of the writ to be amended, by inserting the name of *Mr. Pope* instead of that of *Mr. Day*.

Mr.

*Seemle*, the sheriff cannot, under the provisions of the 13th section of the act 7 & 8 *Vict.* c. 92, enter into the question of a scrutiny.

Mr. *Tripp* supported that application, and referred to  
*Ex parte Parnell*(a).

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THE  
CORONERSHIP  
OF HEMEL  
HEMPSTEAD.

The LORD CHANCELLOR, however, declined to make any order to suspend the issuing of the writ, or any order upon the sheriff to amend the return, the possible effect of which might be to make him liable to an action for a false return. His Lordship added, that the most he could do would be to make an order that the return be taken off the file, with liberty for the sheriff to make an amended return.

On this day Mr. *Tripp* stated that the officer of the Petty Bag objected to take the return off the file as it was endorsed on the writ, and that unless there was an order to have the writ taken off the return must remain. The Lord Chancellor ordered the writ to be taken off the file.

Nov. 4.

The sheriff having made a special return to the effect that he was unable to amend the return, the present petition by the freeholders for the issue of a new writ was presented, the leave of the Lord Chancellor having been previously obtained.

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The case was argued by consent, as if a cross petition had been presented by Mr. *Pope*, praying a declaration that he was duly elected. By the affidavit of Mr. *Pope* it was sworn that there were 131 votes in favour of Mr. *Day*, which had been in effect declared to be bad by the Court of Queen's Bench, in their judgment on the quo warranto, and that if these were struck off the poll, the result would be to place Mr. *Pope* in a considerable majority. It was also alleged that the sheriff had fraudulently

(a) 1 J. & W. 451.

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dulently contrived with Mr. *Day* to admit the bad votes when it was too late to question their legality, and that he had subsequently refused to enter into a scrutiny.

Mr. *Chandless* and Mr. *Surrage* in support of the petition for a new writ.

The effect of the judgment of ouster in the Court of Queen's Bench was tantamount to a declaration that the office of coroner was vacant; for in truth there existed no evidence whatever as to which of the candidates had the legal majority. A return, therefore, of Mr. *Pope* now would, under the circumstances, be impossible. It is to be observed, that by the 13th sect. of the act, 7 & 8 Vict. c. 92, the sheriff is bound to make proclamation of the person chosen on the day next but one after the close of the poll, and provisions of this nature must be precisely followed, *In the Matter of a Coroner for Stafford (a)*.

Mr. *Tripp*, and Mr. *Campbell Foster*, for Mr. *Pope*, contra.

We submit that the analogy of a petition to the House of Commons, claiming the seat of a sitting member on the ground of his majority being made up of bad votes, is strictly applicable to the present case, and that the effect of the judgment of ouster was to place Mr. *Pope* in the office from which Mr. *Day* was ousted. There is no precedent for the issuing of the writ de coronatore eligendo on grounds like the present, the only foundation for such new writ being the death, incompetency, or misconduct of the coroner. The sheriff having refused to enter into the question of scrutiny, which is incident to every election, Mr. *Pope* was compelled to have recourse to the Court of Queen's Bench, and now the sheriff, although only a ministerial officer, disregards the judgment which Mr. *Pope* has obtained. Under these

(a) 2 Russ. 475.

*these* circumstances the return which has been made *must* be treated as a nullity, and it is quite competent *for the* Lord Chancellor to decide as to the relative *rights* of the parties, and to make an order upon the *sheriff* for the time being, directing him to elect Mr, *Pope*. It was said, that the sheriff could not now enter into the consideration of the relative rights of the candidates or make a return, inasmuch as he is no longer *sheriff*, and that he is bound by the statute to make the return on the day next but one after the close of the poll; but according to *Dalton*, "If the return of the old sheriff happen to be erroneous, and that a new *sheriff* be chosen, yet the Court may cause the old *sheriff*, or his under-sheriff, clerk or deputy, to amend the same."—*Dalton on the Office of Sheriff*, p. 19. By the 13th section of the act, 7 & 8 Vict. c. 92, it is provided, that the name and place of residence of each elector should be taken down, and for whom he polls, so that the *sheriff* ought not to be in any difficulty as to the votes to be struck off in consequence of the judgment of the Court of Queen's Bench.

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Without calling for a reply,

The LORD CHANCELLOR.

This is the clearest possible case. Wherever there is a vacancy in the office of coroner, it is the right of the freeholders of the county to have the writ issued for the election of a new coroner. In the present case a writ has already issued upwards of two years ago, when an election took place; but in point of fact there now is in this district no coroner, as the return was contested in the Court of Queen's Bench, when judgment of ouster was, at the instance of Mr. *Pope*, pronounced against Mr. *Day*, the candidate returned. Upon that occasion some of the freeholders applied to me for a writ de coronatore eligendo; the issuing of that writ was a matter of course.

A short

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*In re*  
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 OF HEMEL  
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A short time afterwards it was represented to me *ex parte* by Mr. *Pope*, that the numerical majority of votes for Mr. *Day* was composed of a class of voters who, according to the decision of the Court of Queen's Bench, were not entitled to vote; and that the consequence was that Mr. *Day* being ousted, Mr. *Pope* ought to have been returned. On that ground I thought it right to make an order, enabling the sheriff to amend his return as he might be advised. In making that order I am no sure that I did not do more than I ought to have done. All that I intended was to give the sheriff an opportunity of correcting any error if he had been satisfied that an error had been committed; but of that liberty he has not chosen to avail himself, and I agree that what the sheriff has now returned is in effect no return at all. It amounts merely to a statement that he does not choose to amend his return. Although, therefore, in 1852 Mr. *Day* was returned as coroner, and since then there has been judgment of ouster against him, yet there has been no return in favour of Mr. *Pope*. Under these circumstances I can not direct the sheriff to make such return, nor can I enter into the question of a scrutiny, which was suggested, as to whether any of the votes tendered for either party were good or bad, and then order the sheriff to amend the return accordingly. It was alleged that the sheriff had not only made a false return, but that he had also contrived fraudulently with Mr. *Day* to let in bad votes in masses of hundreds at a time when it was too late to have their illegality questioned; if that be true Mr. *Pope* has a good ground of action against the sheriff and will be entitled to receive ample compensation at his hands. With respect to the refusal of a scrutiny by the sheriff, in my opinion, according to the statute, there could not under the circumstances of this case have been any scrutiny. I only say this extrajudicially; but I do not see how the sheriff can now be complained

complained of for not scrutinizing the votes, as he is bound to seal up the books at the conclusion of the poll, and obliged to make the return, proclaiming the person chosen, on the day next but one after the close of the poll. The result therefore is, that the writ must issue.

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*In re*  
THE  
CORONERSHIP  
OF HEMEL  
HEMPSTEAD.

BURROWS v. WALLS.

Feb. 28.  
March 3, 10.

THIS was an Appeal by the Plaintiffs, from the decree of the Vice-Chancellor *Wood*. The original bill was filed by the five children of *Thomas Burrows*, the testator in the cause, against the Defendants *J. Walls*, *H. Cowell* and *S. Newsham*, the three executors and trustees of the testator, and by revivor against *S. Sturgis*, the official assignee of *S. Newsham*, who since the institution of the suit had become insolvent. The bill set forth the will of the testator, whereby, so far as it is material to be stated, he gave, devised and bequeathed unto the Defendants *J. Walls*, *H. Cowell* and *S. Newsham*, all the residue of his real and personal estate, upon trust for sale, and directed them to invest 1,200*l.* thereof, and to pay the dividends to his wife for life; and if such dividends should not amount to 50*l.* per annum, then the trustees were to make up such annual sum of 50*l.* out of the principal, and after her decease the testator directed that

Before *The*  
*Lord Chan-*  
*cancellor*, LORD  
CRANWORTH.

A testator, by his will, gave the residue of his property to three trustees, whom he appointed executors, upon trust to sell and invest the same and to pay the income thereof to his widow for life, and after her decease, to his children, who were all infants at the time of his death. The eldest child attained twenty-

one in the year 1839, and the youngest in 1846. The three executors proved the will, but one of them almost exclusively acted. The money which was the proceeds of the estate was suffered by two of the executors to remain in the hands of the third, who ultimately became insolvent. On the youngest child attaining twenty-one, he, on behalf of himself and his brothers and sisters, attempted to obtain payment from the acting executor, and in 1848 wrote to him a letter consenting to receive payment of the amount then admitted to be due by annual instalments. In 1849, and shortly before the insolvency of the acting trustee, a bill was filed by all the children against the three trustees for the purpose of making them each responsible:—*Held*, that inasmuch as it was the duty of the three trustees to have explained to their cestuis que trust what their rights were, and as they had not done so, there was nothing in the conduct of the children to deprive them of their remedy against the three trustees, who were accordingly declared to be jointly and severally liable to make good the deficiency.

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that the trustees should apply the dividends, and also the interest and dividends of the residue of his real and personal estate, towards the maintenance, education and advancement of his children, until they should respectively attain the age of twenty-one years; and the testator gave the residue of his estate to and among all his children who should be living when the youngest of them should attain twenty-one years, and the issue of such of them as should be then dead, as tenants in common, and he authorized his trustees to advance 500*l.* to each of his sons, and 300*l.* to each of his daughters, on attaining the age of twenty-one years, out of such residue, to be deducted out of their respective shares; and he directed, that, after his wife's decease or marriage, his trustees should hold the said 1,200*l.* upon trust for his sons, living at his wife's decease, on attaining the age of twenty-one years, as tenants in common, or to the lawful issue of any dying under that age; and in case any of his sons should die under the age of twenty-one years, and without lawful issue, then he gave the share of such son or sons to his children, as well sons as daughters, living at the death or marriage of his wife, and the issue of such of them as should then be dead, as tenants in common. The will also contained a power to the trustees to give receipts, and a declaration that the trustees should be charged and chargeable only for such monies as they should respectively actually receive, notwithstanding their or his giving or signing any receipt or receipts for the sake of conformity, and that they should not be answerable or accountable the one for the other or others of them, or for the acts, receipts, payments, neglects or default of the other or others of them, but each of them only for his own receipts, payments, neglects or defaults, nor be answerable or accountable for any banker, broker, or other person with whom the trust monies should be deposited, or otherwise

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that the trustees should apply the dividends, and also the interest and dividends of the residue of his real and personal estate, towards the maintenance, education and advancement of his children, until they should respectively attain the age of twenty-one years; and the testator gave the residue of his estate to and among all his children who should be living when the youngest of them should attain twenty-one years, and the issue of such of them as should be then dead, as tenants in common, and he authorized his trustees to advance 500*l.* to each of his sons, and 300*l.* to each of his daughters, on attaining the age of twenty-one years, out of such residue, to be deducted out of their respective shares; and he directed, that, after his wife's decease or marriage, his trustees should hold the said 1,200*l.* upon trust for his sons, living at his wife's decease, on attaining the age of twenty-one years, as tenants in common, or to the lawful issue of any dying under that age; and in case any of his sons should die under the age of twenty-one years, and without lawful issue, then he gave the share of such son or sons to his children, as well sons as daughters, living at the death or marriage of his wife, and the issue of such of them as should then be dead, as tenants in common. The will also contained a power to the trustees to give receipts, and a declaration that the trustees should be charged and chargeable only for such monies as they should respectively actually receive, notwithstanding their or his giving or signing any receipt or receipts for the sake of conformity, and that they should not be answerable or accountable the one for the other or others of them, or for the acts, receipts, payments, neglects or default of the other or others of them, but each of them only for his own receipts, payments, neglects or defaults, nor be answerable or accountable for any banker, broker, or other person with whom the trust monies should be deposited, or otherwise

otherwise in the execution of the trusts, nor answerable or accountable for the rise or fall in the stocks, or the insufficiency or deficiency in title or value of any security upon which the trust monies might be invested, nor for any other misfortune, loss or damage which might happen in the execution of the trusts or in relation thereto, except the same should happen through or by his or their wilful default respectively. The testator declared the bequests to his daughters to be for their separate use, and he authorized the trustees to reimburse themselves their expenses, and appointed them executors.

At the death of the testator on the 22nd November 1825, all his children were infants; his son *George Henry Burrows* attained his age of twenty-one in June 1846, his son *William* on the 1st July 1842, his son *James* on the 8th March 1844, his daughter *Elizabeth Pollard*, the wife of *W. Pollard*, on the 22nd April 1839, and his daughter *Alice Oakey*, the wife of *H. Oakey*, on the 5th August 1840. *Ann Burrows*, the widow, died on the 14th November 1844, and the Plaintiffs thereby became absolutely entitled to the whole of the testator's residuary estate. *W. Pollard* and *H. Oakey* were made Defendants.

The bill charged that the Defendants *J. Walls*, *H. Cowell* and *S. Newsham* had been guilty of great neglect and had committed divers breaches of trust in the management of the testator's estate, whereby considerable loss had arisen to such estate, and that considerable sums of money had been lost to such estate from their wilful neglect or default; and as evidence of such breaches of trust, and neglect and default, the bill charged that divers sums of money, which had arisen from or formed part of the estate of the testator, had been laid out in the purchase of houses or land, contrary to the trusts of the will,

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will, and other sums of money, which had arisen from or formed part of the estate of the testator, had been received by *S. Newsham* only, and had for some years been allowed to remain in his hands uninvested, and that there was a considerable sum of money due and owing from him to the estate of the testator, in respect of some sums of money so received by him. The bill charged that *S. Newsham* admitted that a sum of 700*l.* with interest thereon, to a considerable period of time was due from him to the estate of the testator, but alleged that he was insolvent and wholly unable to pay the same. The bill prayed that the trusts of the will might be carried into execution, and an account of all sums received by the three Defendants, or either of them or which without their wilful default might have been received by them or either of them, and that the Defendants *J. Walls* and *H. Cowell* might be severally held liable for any sum of money due and owing from *S. Newsham* to the estate of the testator, and particularly for the sum of 700*l.*, and that the Defendants *W. Cowell* and *S. Newsham* might be directed to pay the costs of the suit.

The Defendant *S. Newsham*, by his answer, stated that he, shortly after the death of the testator, alone possessed himself of the testator's personal estate and effects, and entered into possession or receipt of the rents and profits of his real estate, and paid, as he believed, all the testator's debts and funeral and testamentary expenses, and the legacies bequeathed by the will, and that he continued in such possession and receipt till some time in the year 1835, when it was agreed between him and *Ann Burrows*, the widow of the testator, that he should relinquish to her the possession of all the said trust estate, and that she should manage it for the benefit of herself and her children, the Plaintiffs (who were then

all under the age of twenty-one years), according to the trusts of the testator's will; that in pursuance of such agreement, an account of the trust estate was rendered by him to the widow, and was examined and found to be correct by her, and by such account it appeared that he was then indebted to the trust estate in a considerable sum, being as nearly as he could recollect the sum of 1,360*l.*, and it was agreed between him and the widow that he should pay to her interest on the said sum of 1,360*l.*, after the rate of 4*l.* per cent. per annum; that she possessed herself of all the rest of the testator's personal estate, and entered into the possession or receipt of the rents and profits of his real and leasehold estates, and that from thenceforth, being sometime in the year 1835, down to the time of her death, in the month of *November* 1844, she had the sole possession of the whole of the trust estate, and that he paid her interest after the rate aforesaid, on the debt due from him to the trust estate, and that since the year 1835 he paid to the widow and to the Plaintiffs *C. Pollard* and *A. Oakey*, certain sums of money in respect of his said debt to the said trust estate, which payments amounted to about 660*l.*, and that after such payments he remained indebted to the trust estate in the sum of 700*l.*, on which he paid interest after the rate of 4*l.* per cent. per annum to the widow, and that after her death he paid interest after the rate aforesaid, on the said debt of 700*l.*, to the Plaintiffs, up to the 1st *January* 1847, since which time his affairs had been in a state of great embarrassment, and he had been and was wholly unable to pay the debt of 700*l.* or any interest thereon. He also stated that all the Plaintiffs, except *G. H. Burrows*, attained the age of twenty-one years during the life of their mother, and that they all approved and acquiesced in the conduct and management of the trust estate by their mother, and the payment of interest made to her.

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The answer of *J. Walls* admitted receipts to the amount of 158*l.*, but claimed a balance due to himself of 8*l.* in respect of such receipts. It stated that *S. Newsham* had been the acting trustee, and that with the exception of the 158*l.*, he had received all the rents and all the personal estate of the testator.

With respect to the sales of the testator's property effected by *S. Newsham*, the Defendant *J. Walls* said he only joined in the conveyance for the sake of conformity, and that otherwise he had not sold or disposed of any part of the testator's estate.

The evidence of the maternal uncle of the Plaintiffs was relied upon by the Defendants, to show that there never had been any objection by any of the Plaintiffs to *S. Newsham's* acting alone, but that, on the contrary, they had all assented thereto, and never in any case suggested or desired that the Defendant, *J. Walls*, should interfere in the affairs of the trust.

When the cause came on to be heard before the Vice-Chancellor *Turner*, on the 1st April 1852, the usual accounts of debts and legacies were directed, and an inquiry whether any monies belonging to the testator, and to what amount, and whence arisen, had been left in the hands of the Defendant, *S. Newsham*, uninvested, and during what time and in what manner, and under what circumstances, and what had become thereof, with liberty to state special circumstances, further directions and costs being reserved.

The Master, by his Report, found among other things that the Defendant, *J. Walls*, had acquiesced in the Defendant, *S. Newsham*, acting generally in collecting and getting in the testator's estate, and in taking on himself the exclusive management of the trust estate.

He

He found the agreement of 1835, as stated in *S. Newsham's* answer as to the settlement of account between the Defendant, *S. Newsham*, and *A. Burrows*, the widow, showing that the trustees were indebted in 1,360*l.*; and after referring to various payments by him, and to amounts due from him in respect of interest, he found the sum of 84*l.* 4*s.* 8*d.* due for principal and interest to the Plaintiffs on the 1st *January* 1854, and that the Plaintiff, *G. H. Burrows*, had applied for an account and payment, when he came of age, of what was due and divisible between himself and his brothers and sisters in respect of the estate, and that they were all desirous that what was due should then be paid.

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The Master also found that the following, among other letters, had passed between the parties. On the 14th *July* 1846, the Plaintiff, *G. H. Burrows*, wrote to the Defendant, *S. Newsham* :—" Dear Sir—As executor under the will of my father, I thought it a duty (not knowing that you are at present aware of it) to inform you of my being now twenty-one years of age, my birthday being the 19th *June*, and at the same to say I hope that if all be well to be in *Lancashire* seven weeks from this time, for a few days. As I believe there is a small sum still in your hands, I should feel obliged if you could inform me whether it will be convenient to you at that time to settle this, with other matters relating to our family; and in case it should not be so, whether it will be requisite for me to attend in person when the affairs are brought to a close. I should be much obliged if you would send me a line in answer to the above; and believe me to remain yours respectfully, *Geo. Henry Burrows*." This letter was answered, expressing in general terms a desire to have matters settled.


The report, after setting out some other letters from the  
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Plaintiff *G. H. Burrows* to the Defendant *S. Newsham*, urging a settlement, set forth a letter of the Plaintiff *G. H. Burrows* to the Defendant *S. Newsham*, bearing date the 6th *July* 1848, which appeared to be in answer to a proposal emanating from *S. Newsham*, and which letter was to the following effect:—"I beg to acknowledge your communication of yesterday, and in answer thereto am instructed to inform you for my own part, and on behalf of the other members of the family, that the conditions, if duly performed, will be satisfactory. At the same time I must add, that if you were placed in a position to pay more than 50*l.* per annum of the principal, we shall expect you to do so, as you will perceive that at the proposed rate the payment will extend over many years. Your remittance I understand, will arrive next week; please address it to my uncle; and you will oblige by informing him, at the same time, whether the unsold pew is or has been occupied, and if it has, we shall be glad to have an account of the rent. We shall consider the first instalment of principal to be due on the 1st *July* next, and trust it will, with the interest, be punctually paid, without requiring any of us to write to you. We are at a loss as regards the sale of furniture which took place at *Southport* two years ago; the sum of 85*l.* was received on that account, and as we have no statement from the auctioneer, we wrote to know whether there was any balance beyond that sum, in order that we may understand our exact position. In conclusion, for our security, we shall require a stamped document for the principal, amounting to 700*l.*, in the form of a note of hand, which you will be so good as to send along with your remittance."

The first instalment becoming payable on the 1st *July* 1849, and not being paid, the Plaintiff, *G. H. Burrows*, on the 4th *July* 1849 wrote the following letter to *S. Newsham*:—"Much as I anticipated, you have not answered

swered my note, and more than that, hitherto you have broken your promise. What your ideas of such promises as you have made may be I am at a loss to imagine, but you must be aware that no confidence can be placed in the word of a man who makes promises but never performs them. Enough of this. I for one am determined no longer to submit to such treatment. I have therefore only to say, that if by *Monday* next you do not send the full amount you must abide by the consequences, which, whatever they may be, will bring upon yourself, as you alone are to blame."

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No notice having been taken of this letter the Plaintiff, *G. H. Burrows*, wrote on the 6th *August* 1849 to Mr. *Walls* as follows :—

" Dear Sir,—I must apologize for troubling you, but as I apply to you as trustee under my father's will, I hope you will excuse. I think you are aware of the position our family occupies with regard to *S. Newsham* ; we cannot get him to do anything, although he has promised a good many things. We have now placed the matter in the hands of a solicitor. The purpose of my present note is to know if you would be so good as to send me any information you can get with regard to *Newsham's* circumstances ; whether he has left business ; whether he is still clerk to the Commissioners, and any information which from your position you may be able to communicate. If it would not be too troublesome, I should feel very much obliged if you would send an answer by return. Mr. *Newsham* has behaved to us in a most shameful manner, to which we are determined to submit no longer. Two letters from myself, and one from our solicitor, have not been noticed at all. The next will be a complete exposure of his conduct.—Believe me to remain, with best respects, yours very truly,

" *G. H. Burrows.*"

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In answer to his letter Mr. *Walls* wrote as follows:—

“Dear Sir,—In reply to your letter of the 6th of *August*, I feel very sorry that I cannot give you any information beneficial or advantageous to you or the family respecting your interest expectant from Mr. *Newsham*. My son writes this letter under my instructions; yet I hope, you are determined to take proceedings against Mr. *Newsham*, that I may not be implicated in them giving you the information you require. I give you the best information I can, but I beg I may not be implicated by giving the information you require. Mr. *Newsham's* circumstances at present are very bad, yet he retains the situation of commissioner's clerk, magistrate's clerk, and secretary to the Bath Company; he has abandoned his professional business, but that is not much. I am convinced that from my knowledge, and from that of my son, you cannot succeed in obtaining from him the money due to you, neither from his present various occupations nor also from his property, as the former barely maintains himself, his clerk, and housekeeper.”

To which *G. H. Burrows* wrote in answer:—“I beg to acknowledge with best thanks your favour of yesterday, and trust you will have no occasion to regret the confidence you have reposed in me. You may depend upon it you shall not be in any way implicated. As regards *Newsham*, since he will make no arrangement, nor even condescend to reply to our letters, he must take the consequences, which I now learn will be worse than I was at first aware of; but he has only himself to blame. Our money he has had and must account for it.”

The Master also found that the Plaintiffs had agreed to the Defendant, *S. Newsham*, retaining the monies in

**h**is hands, and arranged with him, in the manner in the correspondence mentioned, the terms on which he should **do** so. And he also found that such an arrangement **was** only entered into after repeated attempts had been **made** unavailingly to obtain immediate payment thereof, **and** was only assented to by the plaintiffs because they **could** not obtain better terms. And he also found that **the** Defendant, *J. Walls*, did not know that any such **as**sent or arrangement had taken place until after the **m**onth of *July* 1849. And he also found that, before **th**e 8th *August* 1849, no application was made by or on **th**e part of the Plaintiffs for the payment of the said **m**onies, except to the Defendant *S. Newsham*. And he **al**so found that the Plaintiffs never entered into any **ar**rangement or agreement with the Defendant *S. Newsham*, **fo**r allowing the balance due from the trustees to remain **i**n the hands of *S. Newsham* anterior to the arrangement **e**ntered into in or about the month of *July* 1848, as **m**entioned in the aforesaid correspondence.

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The Defendant *Walls* excepted to that report in all **th**e particular conclusions arrived at by the Master, but **h**is exceptions were overruled.

When the cause came on to be heard on further directions on the 26th *July* 1854, before his Honor the Vice-Chancellor *Wood*, it was ordered, that the Defendant *J. Walls* should pay to the Plaintiffs the costs of the exceptions, and it was referred to the Taxing Master to tax the costs of the Plaintiffs (except the costs of the exceptions), and also those of the Defendants, except *S. Newsham*, of the suit; the costs of the Defendants to be taxed between party and party, to be paid by the Plaintiffs, without prejudice to the Defendants' right to have their costs as between solicitor and client in case

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 844*l.* before the 1st *January* 1855.  
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From that decree, except in so far as it directed the Defendant *J. Walls* to pay the costs of his exceptions, the Plaintiffs now appealed to the Lord Chancellor.

Mr. *Rolt* and Mr. *W. D. Lewis*, for the Plaintiffs in support of the appeal.

The breach of trust of which we complain took place in 1835, when confessedly all the Plaintiffs were infants; and the only question now is, whether on their attaining their respective ages of twenty-one they or any of them have acquiesced or done any act whereby any one of the trustees has been released. We submit that in the case of infants attaining twenty-one, no case of release can be substantiated without satisfactorily proving that they were aware of their rights, it being established that the protection of the Court to infants enures after majority until they have acquired all the information which might have been had in adult years, *Walker v. Symonds* (a).

The Vice-Chancellor has rested his judgment mainly on the assumption that the present case is analogous to that of principal and surety, and that the Plaintiffs by pursuing one of the trustees has released the others, but— they all were equally accountable; and one test of the inapplicability of the analogy is, that the letter of the 9th July 1848 to *S. Newsham* would have afforded no impediment to the Plaintiffs' proceeding against either of the other trustees. The facts of this case as found by the Master furnish no pretext for the allegation that there was a giving of time or of acquiescence, nor do they suggest any grounds for an inquiry such as that which

(a) 3 *Swanst.* 1. See p. 69.

**which** was granted in *Styles v. Guy* (a), no such defence **having** been taken by the answer; and even if such had **been** taken, any inquiry under the circumstances would **have** been refused, *Lincoln v. Wright* (b).

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**Mr. James** and **Mr. Cairns**, for the Defendant *J. Walls* in support of the Vice-Chancellor's decree.

**The** case is clearly not one of an equitable debt which **must** be satisfied by a release, but one of principal and surety, and it is so treated in the bill, which proceeds on the assumption of the debt being a debt due from *S. Newsham* and for which the other trustees are liable in a secondary degree. Upon the facts as established before the Master it must be assumed that the trust funds originally were rightly in the hands of *S. Newsham*, and there is no evidence to show that there was so far any breach of trust, at least to the knowledge of his co-trustees. The agreement between *S. Newsham* and the tenant for life is proved to have been communicated to the Plaintiffs, and after the death of their mother payments are proved to have been made to some of them on account of principal and interest on their shares, showing that they acted upon and recognized the agreement as subsisting, while during all this period no communication was ever made to the Defendant *Walls*. This mode of dealing clearly shows such an acquiescence as will release the surety; *Brice v. Stokes* (c); *Oakeley v. Pasheller* (d); *Munch v. Cockerel* (e), and a good defence against one co-Plaintiff is equally available against all, the 49th section of the recent act 15 & 16 Vict. c. 86, allowing amendment as to misjoinder, not being retrospective. [The Lord Chancellor. At the present stage of the proceedings the Respondents can,

(a) 1 Mac. &amp; G. 422.

(d) 4 Cl. &amp; F. 207.

(b) 4 Beav. 427.

(e) 5 Myl. &amp; Cr. 178.

(c) 11 Va. 319.

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can not avail themselves of any objection on the ground of misjoinder.] There are two species of breaches of trust, one where the trustee has omitted to do a particular act, as for example to renew a lease; in such a case there must be something in the nature of a release to exempt the trustee from liability, but where there is a continuing breach, as where the breach of trust consists in allowing trust monies to remain in a state of investment which would not be authorized by the Court, in such a case, although the breach of trust is equally great the second year as the first year, yet if the cestui que trust approves and acquiesces as to the state of the investment in the second year, it is unimportant whether he did so or not as to the first year, *Broadhurst v. Balguy* (a).

Mr. W. D. Lewis, in reply.

The alleged case of acquiescence made at the bar, though not raised by the answer according to the rule laid down by *Lord Cottenham* in *Styles v. Guy* (b), could only consist of what would be tantamount to an approval of the debt due from *S. Newsham* remaining in his hands; but in truth there is no shadow of foundation for such an equity, and to be availing it must be established beyond all doubt. But assuming for a moment that this was a case analogous to that of principal and surety, and that there has been a giving of time to *S. Newsham*, still the Defendant *Walls* must show that he has been prejudiced by the delay.

At the conclusion of the argument the Lord Chancellor expressed his opinion to the effect that he had no doubt as to the original liability of all the three trustees. With respect to the question as to whether there had been anything in the conduct of the cestuis que trust to release the

(a) 1 Y. & C. C. C. 16. (b) 1 Mac. & G. 422. See p. 427.

the two trustees, who had not taken an active part, from their original responsibility, his Lordship observed that there was clearly no case of acquiescence on the part of the Plaintiff *George H. Burrows*, who attained his majority in 1846, and who had ineffectually endeavoured to obtain a settlement of accounts with Mr. *Newsham*, but that, inasmuch as the position of the other children might be different, he would reserve his decision upon the whole case.

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*The LORD CHANCELLOR.*

*March 10.*

In this case, in which I reserved my judgment for further consideration, the facts were in substance these: the father of the Plaintiffs, who were all infants at the time of his death, died in the year 1825, having by his will given his property in effect to his widow for her life, and at her death to such children as should be alive when the youngest child should attain twenty-one. There were three executors appointed, and the direction in the will was, that the property, both real and personal, should be got in, sold and converted into a common fund, upon the trusts I have just stated. There were five children, The widow enjoyed the property during her life; the eldest child attained twenty-one in the year 1839, and the youngest in the month of *June* 1846. The three trustees—the three executors—got in the property. One of these, Mr. *Newsham*, who almost exclusively acted, was a professional man; the other two were not professional men, but friends of the family, and they acted in a very slight degree. One of them, the Defendant Mr. *Walls*, received a sum of about 150*l.*, which he paid over to Mr. *Newsham*. It does not appear that the other executor, Mr. *Cowell*, received anything. Neither of them ever interfered, but permitted Mr. *Newsham* to keep the property in his hands, and he paid interest on the same, at the rate of 4*l.* per cent., to the

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the widow for her life. I have represented the widow as tenant for life, though she was strictly entitled only to 50*l.* a year, but as the property produced about 54*l.*, the whole was paid to her, and no objection has been urged on that ground. Considerable advances were made during the life of the widow to the two daughters, who married, more than would have been their shares, but those payments are not questioned by this bill. In the year 1835 an account was stated by Mr. *Newsham*, between himself and the widow, whereby the widow recognized his retaining a sum of 1,360*l.* in his hands, he paying 4*l.* per cent. interest for that money; at that time the children were all infants, and they could be no parties to such an arrangement: even if they were cognizant of the arrangement between their mother and Mr. *Newsham*, the fact of their knowing it would be unimportant. The sum of 1,360*l.*, for which Mr. *Newsham* admitted himself then accountable, has from time to time been reduced; so that eventually when the youngest child became of age, it amounted only to about 700*l.* There have been besides considerable arrears of interest, which, being added to the principal monies, constituted a total sum of about 844*l.*, as ascertained by the Master to be due on the 1st *January* 1854, eight years after the youngest child attained twenty-one.

The bill was filed in *November* 1849, by all the children, against the three trustees, and the substantial object of the suit was to make Mr. *Walls* and Mr. *Cowell* (the argument was addressed as if it was only to Mr. *Walls*, but it must equally apply to both of them) responsible for the whole of these funds, for having improperly left them in the hands of Mr. *Newsham*. Mr. *Newsham* continued to pay interest up to a short time ago, when he became insolvent, and the fund once in his hands has become totally lost. There was a decree for the usual  
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accounts in 1852, and there was a special inquiry under what circumstances the money was left in the hands of Mr. *Newsham*. The Master made his report. To that report there were exceptions taken by the Defendant *Walls*, and the cause having come on upon further directions, and upon those exceptions, before the Vice-Chancellor *Wood*, he, while he overruled the exceptions, held that the children could not sustain any claim upon the report of the Master, against either of the solvent Defendants. As against the Defendant *S. Newsham*, there was no question, but so far as the bill had sought to charge Mr. *Walls* and Mr. *Cowell*, the Vice-Chancellor made the Plaintiffs pay the costs of those gentlemen.

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Now the first question to be considered is, whether there was ever any original responsibility on the part of the three trustees. Upon that head I expressed my opinion at the close of the case. I had no doubt that the three were originally responsible. If the moment any child came of age, the trustees had been called on to account, there can be no doubt that they would have been all responsible, because they all proved the will. In fact they all, or at least two of them, received some portion of the property, and they were all guilty of a breach of trust, in not taking care that the trust of the residue was satisfied by the investment of the property in proper securities. Being all therefore originally responsible, the question is, whether anything has taken place since, by the conduct of the persons entitled as cestuis que trust, which relieves the trustees who have not taken an active part from that responsibility. The grounds relied upon by them for such exemption were two; first, that all the cestuis que trust had, after they had respectively attained twenty-one, acquiesced in the retaining of the money by Mr. *Newsham*, and so absolved the others; and secondly if that were not so, that

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that there had been that which in truth was more than acquiescence, namely, a positive adoption of the conduct of the trustees generally, by making a special arrangement with Mr. *Newsham*, for letting the money remain in his hands, payable by instalments, giving him time for payment. I also expressed my opinion before, that, as far as acquiescence was concerned, there was certainly nothing to affect the Plaintiff *G. H. Burrows*, who came of age in 1846, for the moment he came of age he instantly applied to Mr. *Newsham* and insisted on payment, and was only kept off by a sort of fencing letters from time to time by that gentleman; but under circumstances that showed there was no acquiescence. He knew the money was in *Newsham's* hands, therefore he tried to get it from him; but to call that acquiescence, by letting it remain in his hands, would be quite a perversion of terms. I see no reason to alter that opinion.

The point on which I wished to take time for consideration was, as to how the case stood with regard to the other children, because although the observations I made applied to *G. H. Burrows*, the youngest child, it did not necessarily follow that the same principle would apply to the other children. But, on consideration, I think exactly the same principle on which I held that there was no acquiescence on the part of *G. H. Burrows*, also compels me to hold there has been no acquiescence on the part of any of the others.

With regard to the shares of the two daughters, there is no question about acquiescence, because it appears on the Master's report that they have received more than their shares. It is quite unimportant, therefore, whether they have acquiesced or not, there never can be anything coming to them.

Without,

Without, therefore, going into any minute inquiry as to the daughters, it appears to me that there is no case of acquiescence here. I leave out of the question, for the moment, the letter of the 6th *July* 1848, which is said to amount to something more than acquiescence; but the mere fact of not having called the money in from Mr. *Newsham* does not appear to me a circumstance disentitling any of the Plaintiffs from insisting now on the liability of the other trustees, because I take it that although it is perfectly clear, on all the authorities and all principle, that no cestui que trust can allege that to be a breach of trust which has been done under his own sanction (for that is the meaning of acquiescence, either previous sanction or subsequent ratification), or as was said by Lord *Eldon* in *Walker v. Symonds* (a), "Either concurrence in the act, or acquiescence without original concurrence, will release the trustees, yet," as was added by Lord *Eldon*, "that is only a general rule, and the Court must inquire into the circumstances which induced concurrence or acquiescence,"—so here, where acquiescence is alleged, you must look at all the circumstances of the acquiescence. The extent of the acquiescence in the present case is merely this, that five of these children (I assume from the whole of the circumstances, knowing nothing at all about their rights or the liabilities of the trustees, until they attain twenty-one), at the moment of their respectively attaining twenty-one, take no steps against either Mr. *Newsham* or the other trustees; they wait until the money becomes distributable, which is only when the youngest child attains twenty-one, and then the youngest, acting for them all, instantly applies and demands payment from the person who holds the funds. It would be a perversion of terms to call that acquiescence. In order to be favourable to the trustee who

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who alleges acquiescence, it must be a consent on the part of the persons who have a right to call the trustees to account, that they shall be absolved from liability, and that they will adopt the misapplication of the funds, as having been done under their assent and sanction. It is quite absurd to speak of acquiescence in that sense as against the only person who is trying to get in the funds from the person who holds them, and who would be under all circumstances the person ultimately responsible.

I think, therefore, as regards all the children, the question is brought to this, how far the letter of the 6th *July* 1848, and the arrangement consequent upon it, deprives them of the right against the trustees, which but for that letter they would have been entitled to assert. I do not go through all the other correspondence;—I think it is sufficient to state that it is a correspondence carried on by the youngest son, who attained twenty-one on the 19th *June* 1846, and commenced the correspondence in the following month of *July*, calling on the trustee in whose hands the money actually was, first of all courteously, afterwards more firmly; and lastly angrily insisting on payment of the money. All these attempts being ineffectual, after the lapse of two years the Plaintiff, *George Henry Burrows*, the youngest son, who is stated to have been a banker's clerk and who was then twenty-three years of age, having been unable to get the money during the two previous years, but having received some communication from Mr. *Newsham*, wrote this letter to him on the 6th *July* 1848. [His Lordship here read the letter, see *ante*, p. 240.] Now from that letter the inference deduced by the Defendants is, that there had been an agreement between the children, represented by *G. H. Burrows*, and Mr. *Newsham*, that they would give

give up their right of enforcing payment against him in consideration of his agreeing to pay the principal sum by instalments of 50*l.* per year, with interest at 4*l.* per cent in the meantime. I think that is a fair inference from the letter, though it is not very distinctly stated in the form of an actual agreement. I do not, therefore, proceed on a doubt that such an arrangement was entered into; but the question is, whether that arrangement so entered into, which, if it had been by persons entirely *sui juris*, cognizant of their rights, and who had not the protection of infancy continued after majority, would undoubtedly have absolved the other debtors (whether principals or sureties is immaterial), can, under the particular circumstances of this case, have any binding operation whatever in favour of these trustees? I am of opinion that it cannot, and for this reason—It is perfectly obvious on the face of all the documents, that all the children, as they successively came of age, were entirely ignorant that they had any rights against any person except *Newsham*. It was undoubtedly the duty of the three trustees to have had the money in their hands, but not having it in their hands to have explained to the infants as they came of age what their rights were. They not only did not do that, but the correspondence which takes place afterwards—I will not say necessarily leads the cestuis que trust to suppose but fortifies them in the supposition which they must have entertained, that they had no claim except against *Newsham*. I do not mean to impute to Mr. *Walls* in the correspondence which passed between him and *George H. Burrows* any intention of misleading. I think it very likely that Mr. *Walls* did himself not know what his liabilities were. But what took place was eminently calculated—I will not say to encourage,—but to keep up in the minds of the Plaintiffs the notion that they had no claim against anybody but *Newsham*; and I come to that conclusion from a perusal of the two letters

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letters that passed between them in *July* 1849. The first instalment was to have become payable, as it will be recollected, on the 1st *July* 1849. As might have been anticipated nothing was paid ; in truth *Newsham* became totally insolvent, and then on the 4th *July* 1849, *George H. Burrows* wrote to *Newsham* as follows. [His Lordship here read the letter, see *ante*, p. 240, expressing a determination no longer to submit to any delay on the part of Mr. *Newsham*.] Shortly after that, not receiving any payment and not getting any answer, the young man wrote to Mr. *Walls* on the 6th *August* 1849. [His Lordship here read the letter, see *ante*, p. 241.] That was evidently the letter of a young man ; it was written to his uncle, whom he describes, it is true, as trustee under the will, but I cannot infer from that he knew what the liabilities of this gentleman were. He describes him truly as a trustee under the will, and what answer does the uncle or trustee send ? [His Lordship here read the letter, see *ante*, p. 242.] Now that letter, though there might have been no intention of deception, was evidently calculated to impress on the mind of the young man, and his brothers and sisters, that but for any liability which the writer might incur by giving information of the insolvency of another man, there was no liability at all.

On the whole, therefore, I think it is impossible to read all the correspondence without being satisfied that these children, as they attained twenty-one, knew nothing more than that the money was once in the hands of *Newsham* ; but they were not lawyers, and even if they had been, it is possible that they might not be aware that the other trustees were responsible to them ; and I am of opinion, that neither on the ground of acquiescence nor on that of giving time can they be deprived of their rights or of asserting them against all the trustees if they choose to call upon them ; and the circumstance of the money having been placed

*placed* and always remaining in the hands of *Newsham*, *does not* exonerate the other trustees in whose hands it *ought* to have been but was not, and therefore they are responsible. On that short ground I cannot concur in *the* judgment of the Vice-Chancellor on the subject. In *my* opinion the Plaintiffs, immediately after the money became distributable, took the best steps they could to *get* the money out of the hands of the trustee in whose *hands* it had been wrongfully left by the other trustees. *They* made the best arrangement they could with him, *not* having been apprised as they ought to have been by *the* other trustees, that failing to get the money from *him* they were responsible.

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The decree must therefore be varied. No account is *to* be taken. The subject-matter of the suit refers only *to* the principal sum of 844*l.*, and in respect of that sum *the* decree will be that Mr. *Walls* and Mr. *Cowell* are as *between* themselves and the Plaintiffs responsible, and *they* must be declared liable to pay the amount which *has* already been found due.

On this day Mr. *James* stated that a difficulty had arisen in drawing up the decree, inasmuch as one of the Defendants, *Henry Cowell*, had died before the hearing of the appeal, but after service of notice of the appeal, the fact of his death not having been known when the appeal was heard. Some discussion took place as to what, under the circumstances, was the proper course to be pursued, and it was ultimately arranged between the parties that the Plaintiffs should revive against the executor of the deceased Defendant *Henry Cowell*, and an order for that purpose having been obtained, the Lord Chancellor ordered the cause to be put into the paper the first day of sittings after term.

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On the case being mentioned,

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April 23.

Mr. *Eddis* appeared on behalf of *John Cowell*, the executor of *Henry Cowell*, and admitted that he could not distinguish the case of his testator, the deceased executor, from that of the Defendant *Walls*.

The decree was accordingly taken as of this day, and it declared that the Defendants *John Walls* and *Samuel Newsham* and the estate of the late Defendant *Henry Cowell*, deceased, the trustees of the will of *Thomas Burrows*, the testator, were jointly and severally liable to pay to the Plaintiffs the sum of 844*l.* 4*s.* 8*d.*, the balance found due from the Defendant *S. Newsham*, by the Master's report made in this cause, dated the 29th day of *May* 1854, in respect of the monies arising from the collection and getting in the real and personal estate of the said testator, with interest on the said sum of 844*l.* 4*s.* 8*d.*, at the rate of 4*l.* per cent. per annum from the 29th *May* 1854, until the time of payment; and after directing payment by the Defendants and an account against *J. Cowell*, unless he should admit assets, it was referred to the proper Taxing Master, to tax the Plaintiffs their costs of this suit, and in such taxation he was to distinguish and certify separately so much of such costs as had been occasioned by the Defendant *J. Walls* and the late Defendant *H. Cowell* repudiating their liability to the Plaintiffs for the receipts of the said Defendant *S. Newsham*; and the Taxing Master was to tax the Defendant *J. Walls* and the late Defendant *H. Cowell*, and the Defendant *J. Cowell* as representative of *H. Cowell*, their costs of this suit as between solicitor and client, except so far as they had been occasioned by their or either of their repudiating their or his liability to the Plaintiffs for the receipts of *S. Newsham*. And such of the taxed costs of the Plaintiffs as should be found to have

have been so occasioned were to be set off against and deducted from the costs of the Defendant *J. Walls* and the late Defendant *H. Cowell* and *J. Cowell* as executor, and if after such set-off there should be any deficiency of the taxed costs of the Defendant *J. Walls* and the late Defendant *H. Cowell*, and *J. Cowell* as executor, the Plaintiffs were to pay such deficiency to the Defendants *J. Walls* and *J. Cowell*, or if after such set-off there should be any deficiency of the taxed costs of the Plaintiffs occasioned as aforesaid, then the Defendants *J. Walls* and *J. Cowell* as such executor, so far as the estate of his testator in his hands would extend, and the Defendant *S. Newsham*, were to pay such deficiency to the Plaintiffs. The costs of the Defendants *J. Cowell*, *W. Pollard* and *H. Oakey* of this suit were also ordered to be taxed, and such costs were to be paid to them by the Plaintiffs. And the Defendant *S. Newsham* was ordered to pay to the Plaintiffs their taxed costs not before directed to be set-off against the costs of the Defendants *J. Walls* and *H. Cowell*, and also the costs which the Plaintiffs should pay to the Defendants *J. Cowell*, *W. Pollard* and *H. Oakey*.

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March 28.

Before The  
LORDS JUSTICES.

NEALE v. DAVIES.

THIS was the appeal of the Plaintiffs, from a decision of Vice-Chancellor *Wood*, on a motion for a decree.

An executrix, by a deed, reciting that she intended to appropriate a part of her testator's assets in payment of a debt due from him to her, declared trusts of the fund intended to be thus appropriated. She died without making the appropriation, which was made after her decease by her executors.

New trustees of the deed, subsequently appointed, executed a declaration of trust (contained in the deed appointing them), whereby they declared that they would hold the fund upon the trusts. On their inquiring,

The Appellants were trustees under the settlement executed previously to the marriage of *William Johnston Neale* with Miss *Frances Herbert Nisbet*. They sought by the bill to obtain a transfer from the Respondents (who were trustees under another deed, on which the question in the case arose), of a trust fund, whereunto they alleged that Miss *Frances Nisbet* was, at the time of executing her settlement, absolutely entitled.

The title to the fund in question stood thus:—By an indenture dated the 28th of *March* 1831, made between *Frances Viscountess Nelson*, Duchess of *Bronte*, of the one part, and *George Charles Lord Vernon* of the other part; after reciting that Viscountess *Nelson* was then entitled to a sum of 31,635 francs of French 5 per Cent. Consolidated Rentes, which formed part of the personal estate of her late son *Josiah Nisbet*, come to her hands as his executrix, and that she intended forthwith to cause that sum to be transferred into and inscribed in the joint names of herself and Lord *Vernon*, the acting trustees of the will of her said late son, but inasmuch as her late son was indebted to her in the sum of

of appointment, for evidence in verification of the recital as to the existence of the debt from the testator to the executrix, none could be discovered:—*Held*, by Lord Justice *Turner*, agreeing with Vice-Chancellor *Wood* (dissentiente Lord Justice *Knight Bruce*), that the trustees could not be compelled to execute these trusts without further evidence of the settlor's title to appropriate the fund.

of 7,000*l.* sterling at his decease, she intended 10,800 francs, part of the 31,635 francs rentes, should be appropriated in satisfaction of the debt due from her late son to her, but that the same should be held upon the trusts hereinafter expressed, it was declared, that from and immediately after the 31,635 francs rentes should have been transferred into the names of Lord *Vernon* and Viscountess *Nelson*, they, their executors, administrators and assigns, should hold the sum of 10,800 francs rentes (part of the larger sum) in satisfaction of the debt of 7,000*l.*, and in trust for *Frances Herbert Nisbet*, and her two sisters (daughters of *Josiah Nisbet*), in equal shares.

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By an indenture dated the 2nd of *June* 1845, made between *Frances Vernon Harcourt* and *Egerton Vernon Harcourt* of the first part, *Frances Herbert Nisbet*, the widow of *Josiah Nisbet*, of the second part, *Frances Herbert Nisbet* (the daughter) of the third part, and the Respondents *Robert Davies* and *William Clement Drake Esdaile* of the fourth part, after reciting that the 31,635 francs rentes had not been transferred into the names of Lord *Vernon* and Viscountess *Nelson* by Lady *Nelson*, in her lifetime, but had since her death been transferred by her executors into the name of Lord *Vernon*, and that thereupon Lord *Vernon* became sole surviving trustee for the purposes expressed by the former deed, and that Lord *Vernon* had died, and that the parties of the first part (his executors) had transferred certain sums of Consols (into which the 10,800 francs rentes, with the accumulations, had been converted) into the names of the Respondents (the Respondents having been the persons selected to be new trustees, as thereafter mentioned, in the place of the parties of the first part), it was witnessed, that the parties of the first part appointed the

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Respondents to be trustees of the former indenture ; and it was thereby further witnessed, that the Respondents thereby declared that they and the survivor of them, and the executors and administrators of such survivor, would stand and be possessed of and interested in the sums of 3*l.* per Cent. Consolidated Bank Annuities, which had been transferred into their names, as thereinbefore was mentioned, upon the trusts, intents and purposes, and under and subject to the powers and declarations, expressed and contained in and by the thereinbefore recited indenture of the 28th of *March* 1831, or such of the same as were capable of taking effect, and upon or for no other trust, intent or purpose whatsoever.

By an indenture dated the 12th of *December* 1846, made between *Frances Herbert Nisbet*, the daughter, of the first part, *William Johnstoune Neale* of the second part, and trustees of the third part, Miss *Nisbet's* share of the trust fund was settled previously to her marriage with Mr. *Neale*. The Appellants were the present trustees of the settlement.

In 1854, the Appellants required the Respondents to transfer the fund to them, but the Respondents alleged that they could not safely do so, there being no evidence forthcoming to show that *Josiah Nisbet* was indebted to Viscountess *Vernon* at the time of his decease, although inquiry had been made in every quarter in which such evidence would probably have been found, if the fact had been as recited.

The Appellants then instituted the present suit, praying by their bill that the Respondents might be decreed to transfer to them Mrs. *Neale's* share of the trust fund,  
according

according to the trusts of the indenture of the 28th of  
*March 1831.*

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A motion for a decree accordingly was made before the Vice-Chancellor. On the part of the Respondents one of them deposed, that in *April 1845*, pending their appointment as new trustees of the deed, the Deponent inquired of the gentlemen who had acted as *Lady Nelson's* solicitors, whether they had any documentary or other evidence in proof of the recital that *Josiah Nisbet* was indebted to his mother in 7,000*l.*, and that these gentlemen replied, that after a careful search they could find no such document. He further deposed, that he had made diligent inquiries in all other quarters from which it appeared likely that information as to the said alleged debt could be obtained, but had been unable to obtain any evidence or any information whatever substantiating the truth of the recital; and in particular had, in *May 1845*, written to *Mrs. Neale* (then *Miss F. H. Nisbet*) asking for information as to the alleged debt, to which *Mrs. Neale* replied, that she never understood that such a circumstance existed. The deponent further stated, that he had consulted a gentleman at the Chancery Bar, now one of Her Majesty's counsel, who advised him, that, without some documentary evidence in proof of the debt, it would not be safe for the trustees to pay over the principal of the trust fund to the testator's daughters on their attaining twenty-one; and that, upon application being made by the Appellants for the transfer of the fund to them, the same counsel was again consulted on behalf of the Respondents, and advised that they could not safely make the transfer without the direction of the Court.

The Vice-Chancellor directed the motion for a decree  
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to stand over, with liberty for the Appellants to amend the bill by adding parties, and they now appealed from that decision.

Mr. *Rolt* and Mr. *J. V. Prior* for the Appellants.

The Respondents do not suggest that they have any ground for doubting the existence of the debt to Lady *Nelson* from her son. All they say is, that there is no evidence of the facts. But before they accepted the trust they inquired and knew the state of the evidence. Can trustees, who have procured the fund to be transferred into their names by executing a declaration of trust, afterwards set up a difficulty in the way of executing the duty, which they undertook being aware of all the circumstances of the case?

Mr. *W. M. James* and Mr. *Selwyn* for the Respondents.

The Vice-Chancellor thought that the Court could not direct the Respondents to do what might be a breach of trust. The fund belonged to the estate of the testator, whose executrix the settlor was. She recites by the settlement that she is beneficially entitled to it. But the fund was never in her lifetime severed from the bulk of the testator's estate, and what right had any one to sever it who was not the representative of the testator? All that the Respondents desired was the indemnity of the Court. They take the fund with notice of its being assets of the testator. Can they part with it without proof that it was properly appropriated, or the concurrence of the persons interested in the testator's estate?

Mr. *Rolt* in reply.

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*The* LORD JUSTICE TURNER.

I am of opinion that the order of the Vice-Chancellor is right. It is true that the trustees accepted the fund upon the trusts of the settlement of 1831, but there is a doubt whether it ought to be held on those trusts. It is said that they knew of this doubt when they accepted the trusts; but I take it to be the law, that if a trustee has accepted a fund upon certain trusts, and then receives information, making it doubtful whether he ought to execute those trusts, he has a right to come to the Court for its direction, whether the trusts ought to be executed. How is the case altered by his knowing of the existence of this doubt at the time when he accepts the trusts? It may be altered in this respect; that he may be liable for the consequences of his having accepted the trusts; but it cannot, in my opinion, be altered so as to bind him to apply the fund to purposes at variance with the trusts to which the fund is subject, or on which it ought to be held.

Suppose a person accepts a fund on certain trusts, and then another, claiming the fund under a paramount trust, gives notice of his claim to the trustee, and says that he will hold the trustee personally liable if he deals with the fund in a manner contrary to the paramount trust. Could the trustee, in the face of such a notice, transfer the fund to his cestuis que trustent? In the case which I have put, if all the cestuis que trustent claiming under the paramount trust were adult, the trustee might protect himself by giving them notice, that if they did not within a reasonable specified time take proceedings to enforce their claim, he should proceed to distribute the fund according to the trusts which he had declared; for then, if the paramount cestuis que trustent did not institute a suit, he would, as I apprehend, be indemnified.

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demnified. But where infants or unborn children are concerned no such notice could preclude their right to assert their title to the trust fund. These trustees know that the fund which they hold was originally subject to other trusts. They have no proof that it has been discharged of those trusts. There is no proof of title beyond the recital that Lady *Nelson's* son was indebted to her in 7,000*l.*, and the recital that she intended a part of his estate to be appropriated to answer the debt. To decree a transfer of these funds may be to apply to one trust property that which belongs to another.

I think the decision of the Vice-Chancellor was right, though I regret the necessity of such a decision. I have often had occasion to consider the question of the liability of trustees under such circumstances, and, where an indemnity could be given, I have advised them to act on such an indemnity, but this is not such a case.

*The* LORD JUSTICE KNIGHT BRUCE.

I dissent entirely. In *June* 1845 a family having a sum of stock which they desire to have held upon certain trusts, request two gentlemen to undertake the trusts, and to allow the fund to be transferred into their names for this purpose. The two gentlemen consent, and by so consenting obtain a transfer of the stock into their names, executing a deed, by which they declare that they will hold the fund on the trusts for the purposes of which alone they obtained the transfer. In 1854, with the same information, neither more nor less, with the same grounds of belief, neither more nor less, they say to their cestuis que trustent, "There is some adverse claim, which existed to our knowledge when we accepted the trust, and we will keep back the fund till the validity of the adverse claim is settled." I am of opinion that it is not competent, in law, equity or honesty, for men so to act.

I am

I am of opinion that if, by paying the fund to their cestuis que trustent, they would make themselves personally liable to the adverse claimant, in the event of his claim being successful, they were and are bound nevertheless to perform the trust which they undertook. But in my judgment they would plainly not be thus liable. I consider that parting with the trust fund in accordance with the duty which they undertook, they would not be answerable to the adverse claimant. As however two learned judges of the Court entertain a different opinion, the order will of course stand.

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Appeal dismissed. Costs to be costs in the cause.

WING v. HARVEY.

THIS was a claim which came on to be heard originally before their Lordships by arrangement. The Plaintiff was the assignee of a policy for 300*l.*, on a life which had determined, and he sought payment of the insurance monies, or a return of his premiums. The policy was effected in 1829, by *William Bennett*, of *Rougham*, on his own life, with "The *Norwich Union Society*," which was represented by the Defendant.

April 20.

Before The  
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A life policy was subject to a condition making it void if the assured went beyond the limits of *Europe* without licence.

An assignee of the policy, on paying the premium to a local agent of the assurance society, at the place where the assurance had been effected, informed him

On the policy was indorsed the following condition:—

"If the party upon whose life the insurance is granted shall go beyond the limits of *Europe*, without the licence of the directors, this policy shall become void: the insurance

that the assured was resident in *Canada*. The agent stated that this would not avoid the policy, and received the premiums until the assured died:—*Held*, that the society were precluded from insisting on the forfeiture.

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insurance intended to be hereby effected shall cease, and the money paid to the society become forfeited to its use."

The policy was effected at a branch office at *Bury St. Edmunds*, at which a Mr. *Lockwood* was the agent of the society, and the premium, on effecting it, was paid to Mr. *Lockwood*. In *October* 1829, the policy was assigned by Mr. *Bennett* to the Plaintiff, as a security for an annuity.

A subsequent grant of an annuity was made by Mr. *Bennett* to the Plaintiff, and another policy effected and assigned to the Plaintiff, and notice of the assignment given at the branch office. The annual premiums of 6*l.* 6*s.* and 4*l.* 5*s.* 6*d.*, payable on the policies, were regularly paid by the Plaintiff or his solicitor to Mr. *Lockwood*, who transmitted them to the head office at *Norwich*. In *June* 1835, Mr. *Bennett* went to *Canada*, where he continued to reside till *July* 1849, when he died. Upon Mr. *Lockwood* applying for some of the premiums upon the policies, after *June* 1835, the Plaintiff informed him of Mr. *Bennett's* residence in *Canada*, and asked whether it would be safe to pay the premiums. Mr. *Lockwood* answered, that the policies would be perfectly good provided the premiums were regularly paid. The premiums were accordingly paid and transmitted to the head office at *Norwich*, whence, in the years 1842 and 1847, certificates of bonuses declared in respect of the policies were forwarded to the Plaintiff, as the owner of them, through Mr. *Lockwood*.

In 1847, Mr. *Lockwood* died, and Mr. *John Thompson* was appointed in his place by the society, as their agent at *Bury St. Edmunds*. He also received and transmitted to the head office the premiums paid by the Plaintiff. Mr.  
*Bennett's*

*Bennett's* absence was stated to Mr. *Thompson*, on his applying for the premiums. Mr. *Bennett* died in 1847, whereupon the Plaintiff demanded the insurance monies, with the bonuses, which had been appropriated to the policies. The society refused payment on the ground of Mr. *Bennett's* residence in *Canada*. They offered, however, to repay the premiums which had been paid since Mr. *Bennett* left *Europe*, with interest at 4l. per cent.

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The present claim was then filed, seeking payment of the insurance monies and bonuses, or in the alternative the repayment of all the premiums which had been paid from the beginning upon the policies, with interest at 5l. per cent.

The above facts were verified by affidavits, and affidavits were also filed in support of the claim, to show that the head office at *Norwich* had notice, independently of the notice given to their local agent, that Mr. *Bennett* was residing in *Canada*. By them it appeared that a will of a person named *Younge*, who died in *Canada*, was produced at the head office, and appeared to have been attested there by Mr. *Bennett*, described as formerly of *Rougham*; and further, that in 1848, the secretary of the society at the head office received a letter, in which Mr. *Bennett* was referred to as the only person from *Bury St. Edmunds* whom the writer knew in *Canada*.

Mr. *Glasse* and Mr. *Fooks* for the Plaintiff.

This is a mutual assurance society, and therefore the analogy to a case in which an article in a partnership agreement has been deviated from by common consent is very close, and notice to one member is notice to the society. With regard to notice, however, it is not necessary to resort to that argument. *Lockwood* and *Thompson* were the agents of the company, with reference



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ference to their business at *Bury St. Edmunds*, and notice to them was sufficient. They were the agents through whom representations were made to the society, and the Plaintiff was entitled to assume that the society would be informed of all that was communicated to their agents.

Mr. *Malins* and Mr. *Rogers* for the Defendant.

The policies became void by the breach of the condition indorsed upon them, and could only have been again entered into by the association itself, or some person having authority from them. *Lockwood* had no authority to grant a policy in contravention of the rules of the society. He could not contract so as to bind the society that the assured might leave *Europe*, and that the society should receive premiums adapted to a residence in *Europe* only. In *Acey v. Fernie*(a), the Court of Exchequer held, that the agent of an insurance office had no authority to receive the premium after the fifteen days, at the expiration of which, without payment, the policy was to be avoided. [The LORD JUSTICE TURNER. There had been no representations in that case by the agent of the office.] [The LORD JUSTICE KNIGHT BRUCE. Here the agent accepted the premium. If he had not done so, the Plaintiff might have gone to another office, but the office receives the money, and now refuses to pay the insurance.] *Lockwood* had no authority to make such a representation. He was the agent of the office for the purpose of receiving premiums which ought to be paid on the conditions expressed on the policy. He could not dispense with those conditions, nor could any one reasonably ascribe to him such an authority. Why did not the Plaintiff inquire at the head office? The only difference between the present case and *Acey v.*

*Fernie*

(a) 7 M. & W. 151.

*Fernie* is as to the event on which the policies are made void. The principle is the same in both. [*The LORD JUSTICE KNIGHT BRUCE.* Suppose the agent of a landlord to receive rent, after observing that a breach of covenant had been committed, could the landlord re-enter?] Perhaps not, if the agent was an authorized land agent, but if he were an ordinary farm servant he could not be supposed to have authority to waive a breach of covenant. The agent here could not bind the society unless expressly authorized so to do. [*The LORD JUSTICE KNIGHT BRUCE.* How was the Plaintiff to know the limits of the agent's authority?] From the nature of his duty, which was to receive premiums according to the contract. It could not be presumed from this that he had authority to vary the contract. [*The LORD JUSTICE KNIGHT BRUCE.* Did not the Plaintiff pay the premiums upon the condition that the policies were to be considered as valid and subsisting, and if he did can he be treated as if he had paid unconditionally? How can he be reinstated in his original position, the life having dropped?] If he cannot it is his own fault, for not having himself communicated with the office at *Norwich*. The evidence shows, that whenever either he or his solicitor paid the premiums it was with a doubt whether the policies continued valid, and the covenants in the annuity deed contemplate the payment of larger premiums on the assured going out of *Europe*.

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*Mr. Glasse* was not called upon to reply.

*The LORD JUSTICE KNIGHT BRUCE.*

If the directors, represented by the Defendant, had themselves personally received the premiums which *Mr. Lockwood* received, with the same knowledge that he had, there certainly would have been a waiver of the forfeiture, and the defence in this case would have been ineffectual

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effectual. But he was their agent, for the purpose of receiving premiums at least on subsisting policies. The premiums in question were paid to him on the faith of the policies continuing valid and effectual notwithstanding Mr. *Bennett's* departure for *Canada* and residence there, a faith in which Mr. *Lockwood* knowingly acquiesced, and to which he expressly acceded. The premiums thus paid having been transmitted by Mr. *Lockwood* from time to time to the directors, and retained by them without objection, I think that whether Mr. *Lockwood* informed or did not inform them in fact of the true state of circumstances in which the premiums were paid to him, the directors became and that they are, as between them and the Plaintiff, as much bound as if he had paid the premiums directly to themselves, they knowing at the time, on each occasion, the place of Mr. *Bennett's* residence. The directors, taking the money, were and are precluded from saying that they received it otherwise than for the purpose and in the faith, for which, and in which Mr. *Wing* expressly paid it. If, however, it were important for any purpose of this suit to determine whether it ought to be inferred, that the directors received from Mr. *Lockwood* some at least of the premiums, with actual, direct, and personal notice of Mr. *Bennett's* foreign residence, I should hold, upon the materials before the Court, an affirmative answer to be the correct answer to that question.

It is unnecessary to refer to the case of the *Duke of Beaufort v. Neeld* (a), as decided by the House of Lords I think in 1845, though perhaps the principles on which that decision proceeded are not inapplicable to the present controversy.

*The*

(a) 2 Cl. & Fin. 248.

*The* LORD JUSTICE TURNER.

In this case Mr. *Lockwood*, and afterwards his successor Mr. *Thompson*, were beyond all doubt the agents of the insurance office to receive the premiums payable upon the policies, and they successively did receive those premiums upon the policies during the whole period from 1835, when Mr. *Bennett* went to *Canada*, to 1849, when he died. The premiums were received with a knowledge, on the part of Mr. *Lockwood* and Mr. *Thompson*, that the payments were made by Mr. *Wing* upon the faith of the policies being subsisting policies and valid, notwithstanding the absence of Mr. *Bennett* beyond the limits of *Europe*, and the society or their officers received those premiums without objection. It has been said, however, that the office so received them without having notice of Mr. *Bennett's* residence beyond the prescribed limits. Now if it was material to decide that question of fact, I should hold, upon the affidavits before us, that the office was affected with notice of the absence of Mr. *Bennett* beyond the boundaries limited by the policies. I think it, however, immaterial to determine that question. The office undoubtedly received the money from their agents to whom it had been paid upon express terms and conditions, and the office, having held out Mr. *Lockwood* and Mr. *Thompson* to the world as their agents for the purpose of receiving the premiums, I think it became the duty of Mr. *Lockwood* and Mr. *Thompson*, and not that of the Plaintiff, to communicate to the head office at *Norwich* the circumstances under which those premiums had been paid to and received by them, and the representations which were made on the occasions of such payments and receipts. Upon these grounds my opinion is, that these policies must be considered to have been continuing policies, and that this claim must therefore be allowed.

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A testator devised lands for life, with contingent remainders over, and then devised other lands to another tenant for life, with contingent remainders over, and charged the latter lands with the payment of a mortgage on the former lands, and also with his debts generally, but gave no express power of sale:—*Held*, that the executor took a power of sale by implication, and that after a sale of the latter lands by the executor, the devisees of the former had no equity against the purchaser in respect of the charge of the mortgage debt.

## ROBINSON v. LOWATER.

THIS was an appeal from the decision of the Master of the Rolls, holding that the executors of a testator named *Richard Sulley* had power to sell an estate situate in the *Sandfield*, at *Nottingham*, and to give a valid receipt to the purchaser.

By the will, which was dated the 11th of *June* 1848, the testator devised three messuages situate in *Railway Place*, *Nottingham*, and also four messuages situate in *Knotted Alley*, *Nottingham*, to the use of his daughter *Elizabeth*, for her life, with remainder to the use of every her children which should be living at his death, and of their respective heirs and assigns for ever as tenants in common, with a gift over, in case his daughter should die without leaving issue. The testator also devised certain messuages in *Nottingham* and two closes in the *Sandfield* at *Nottingham*, to the use of his son *Richard Sulley*, for life, with remainder to the use of his children who should be living at his decease, as tenants in common, with a limitation in the event of that remainder not taking effect. And he devised and bequeathed all his hereditaments and real estate, and shares of hereditaments and real estate situate and being at *Arnold*, in the county of *Nottingham*, and all other his real estate whatsoever and wheresoever, and all his ready money and securities for money (except for what his son in law *John Parr* might owe him at his decease), household goods and furniture, twist, needles, chins, chattels, personal estate, credits and effects of what nature or kind soever, which he might die poss

of, unto and to the use of his son *Richard Sulley*, and of his heirs, executors, administrators and assigns for ever, subject nevertheless, and he thereby charged the same with and to the payment of the sum of 200*l.* owing to Mrs. *Sarah Waplington* on mortgage of his messuages so devised to his daughter *Elizabeth Sulley* as aforesaid, and of the legacies therein mentioned, and with and to the payment of his just debts and funeral and testamentary expenses. But if his said premises at *Arnold*, and his said personal estate, should not be sufficient for that purpose, then he thereby charged his two closes in the *Sandfield* at *Nottingham* aforesaid with the payment of such deficiency; and he appointed his son *Richard Sulley* sole executor of his will.

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The testator, by a codicil to his will, revoked the devise of the real estate at *Arnold* to his son *Richard Sulley*. He died in *July* 1819, and his will was proved by his son *Richard Sulley*, who exhausted the personal estate in payment of the testator's funeral and testamentary expenses and debts, except the mortgage debt due to *Sarah Waplington*.

He also sold the two closes in the *Sandfield* to a purchaser named *Nathaniel Sulley*, in whom an outstanding legal estate in fee simple in them had been and continued vested as a trustee for the testator and his heirs. The purchaser had notice of the will.

The Plaintiffs, who were entitled under the will to the estate mortgaged to Mrs. *Waplington*, instituted the present suit against the persons who were entitled to the closes in the *Sandfield*, and who claimed under *Nathaniel Sulley*, praying by their bill that the Defendants might pay the mortgage debt secured on the estate devised to  
*Elizabeth,*

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*Elizabeth*, or otherwise that the *Sandfield* closes might be sold, and the proceeds applied in such payment.

The cause came on to be heard on a motion for decree. The Master of the Rolls dismissed the bill. The Plaintiffs appealed.

The case is reported below in the 17th Volume of Mr. *Beavan's* Reports (a).

Mr. *Craig* and Mr. *Batten*, in support of the Appeal.

This is not a case in which the executor had a power to sell. It is true, that under a direction in a will that land shall be sold for payment of debts, without saying by whom, the executor takes a power of sale by implication; but that has never been extended to a case where there is no direction to sell, but merely a charge of debt. In *Gosling v. Carter* (b), one of your Lordships held to be a question of intention, to be collected from the whole will, whether the executor took such a power. Here the limitations of the estates render such an intention extremely improbable. In *Forbes v. Peacock* (c) the Lord Chief Baron said, "It appears to me, upon the authority of the cases cited, that where a power is given to sell property for the purpose of either paying debts or legacies, or of converting them into a residuary fund, that power must from its nature belong to the executors. The estate no doubt, in point of law, descends to the heir-at-law, subject to the power to sell; but the heir-at-law is not bound to make any distribution; that is the duty of the executors."

The point has indeed been settled by the recent case.

(a) Page 592. (b) 1 Coll. 650. (c) 11 M. & W. 630—637.

of *Doe d. Jones v. Hughes* (a). In that case a testator had by his will charged all his real and personal estate with payment of his debts, and died intestate as to one estate: it was held, that this estate descended to the heir, subject to a charge which could only be enforced in equity, and that the executrix had no implied power to sell or mortgage it for the payment of the debts. [The LORD JUSTICE KNIGHT BRUCE. Does that case deal with anything beyond the question of the legal estate? Can it govern the present, which is an application to a Court of Equity to give effect to a charge?] The question in the present case is as to the power of the executor to sell, and is not, we submit, one on which equity can differ from law. A power of sale has never been held to be implied in equity where it would not be at law. [The LORD JUSTICE TURNER. Does a charge of debts amount to a direction to institute a Chancery suit? Would not that consequence follow from holding that the executor could not sell?] The same question may be asked with reference to the act of parliament making real estates assets for payment of debts. [The LORD JUSTICE TURNER. But must not the testator be taken to have intended to do something more than would have been done by the law in the absence of any direction?] [The LORD JUSTICE KNIGHT BRUCE referred to *Shaw v. Borrer* (b).] All that was held in that case was, that the executor, with the trustee, who had the legal estate in fee, could make a title: not that the executor could sell alone. On *Shaw v. Borrer* being cited in *Doe d. Jones v. Hughes*, Baron Parke said, "Those cases only show, that where there is a devise to certain persons for the payment of debts, that imports a trust in those persons to raise money to pay debts; but is there any authority that a charge, *simpliciter*, on lands in the hands

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(a) 6 Erch. 223.

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(b) 1 Keen, 559.

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hands of the heir gives the executor power to sell the lands for the payment of the debts?" This question shows, that in the opinion of the learned Judge an executor would not have such a power. A charge of debts cannot be held equivalent to a trust for sale consistently with the well-established distinction between properties subject to the one and the other in the administration of assets; according to which, the one is applicable after, and the other before descended estates.

They also referred to and commented upon *Bateman v. Bateman* (a), *Gaskell v. Hough* (b), *Anonymous* (c), *Harmood v. Oglander* (d), *Pierce v. Scott* (e), *Lloyd v. Baldwin* (f), *Ball v. Harris* (g), *Sugden, Vend. and Purch.* (h).

Mr. Daniell and Mr. J. T. Humphreys, for the Respondents, were not called upon.

*The LORD JUSTICE KNIGHT BRUCE.*

According to the true construction of the will before us, I think that the *Sandfield* closes were well and effectually sold in the circumstances and manner in which they were sold, a statement in which I mean to include a declaration of opinion that the receipt given for the purchase-money was an effectual receipt. I consider the conclusion of the Master of the Rolls the correct conclusion, and that the appeal motion ought to be refused, with costs.

*The LORD JUSTICE TURNER.*

The testator has in effect directed that the deficiency  
 of

(a) 1 *Atk.* 421.

(b) Referred to 3 *Ves.* 110.

(c) *Dyer*, 371 b.

(d) 6 *Ves.* 199.

(e) 1 *Y. & C. (Exch.)* 257.

(f) 1 *Ves. sen.* 173.

(g) 4 *Myl. & Cr.* 264.

(h) Page 847.

of his personal estate for the payment of his debts shall be raised out of the *Sandfield* estate ; for it cannot be said that the direction which charges the estate with that deficiency does not amount to a direction that the deficiency shall be raised and paid out of the estate. The question then is, how and by whom the money was to be raised. The purpose for which it was to be raised being to pay the debts, it must have been in the contemplation of the testator that it would have to be raised immediately, but no power is given to the devisees to raise it; and the will, containing a devise of a life estate, with contingent remainders over, it is impossible that during the subsistence of those contingent remainders the devisees could themselves raise it. On the face of this will, therefore, it was not the intention of the testator that the money should be raised by the devisees. Then who was to raise it? Surely the persons who would have to apply the fund. It seems to me therefore, upon the whole scope of this will, without reference to the cases decided upon the subject, that in this case, at least, it was the intention of the testator that the money should be raised by the executor; and if by the executor, then the executor must be considered as invested with all the powers necessary to raise it. I think there is abundant reason for the conclusion at which the Master of the Rolls has arrived in this case. The Appeal must be dismissed, with costs.

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May 2.

Before *The*  
LORDS JUSTICES.

## M'CORMICK v. GARNETT.

THIS was a petition of appeal from a decree of  
Vice-Chancellor *Stuart*.

Where a husband and wife are domiciled in *Scotland*, in which country a wife has no equity to a settlement, the Court here will order payment of the wife's legacy to an assignee of the husband.

A question of foreign law, being one of fact, must be decided in each case on evidence adduced in it, and not by a decision or on evidence adduced in another case, although similarly circumstanced.

The suit was one for the administration of the estate of a testator named *William M'Cormick*, who by will bequeathed a legacy in the following words:—"bequeath to *Mary Macdonald*, wife of *John Macdonald*, of *Ben Nevis*, *North Britain*, distiller, 5000 sterling."

The legatee and her husband were both domiciled in *Scotland*, and the husband had assigned the legacy.

The accounts of debts and legacies having been taken, the cause was heard on further directions before the Vice-Chancellor, on the 28th of *February* 1854, when the legatee and her husband and the assignee appeared without petition, and asked that the legacy might be ordered to be paid to the assignee.

The Vice-Chancellor directed that a sum of bank annuities, equal in value to one moiety of the sum due for principal and interest, in respect of the legacy, should be carried over to a separate account, intituled "*The account of Mary Macdonald and her children*," and directed the dividends to be paid to her on her sole receipt, and for her separate use, during her life or until further order, with liberty to apply on her death, and he directed that the other moiety, after deducting thereout the debt of £200l., in respect of which the set-off was claimed by the executors, should be paid to *William Macdonald*.

The

The husband and wife and assignee, who were not parties to the suit, appealed, having obtained leave for that purpose. In support of the appeal an affidavit was filed of there having been no settlement, or agreement for a settlement, of the fund in question. An opinion was also produced of a Scotch advocate (which was stated to have been acted on in another cause, but was not verified in this), to the effect that, according to Scotch law, an assignee, in such circumstances, was absolutely entitled to the whole fund.

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Mr. *Craig* and Mr. *Renshaw*, for the husband and the assignee, and Mr. *Dauney* for the wife, said that the point had been decided recently by the Vice-Chancellor *Kindersley*, in an unreported case of *Lowe v. Smith*, where the wife of a domiciled Scotchman was held to have no equity to a settlement.

They also referred to *Sawer v. Shute* (a); *Campbell v. French* (b); *Dues v. Smith* (c), and *Anstruther v. Adair* (d).

Mr. *Cairns*, for the Plaintiff, offered no opposition.

Their LORDSHIPS said that, in strictness, as the Petitioners were not parties to the administration suit, the proper form of decree would have been to carry over this particular fund to a separate account of the husband and wife, but that on proper evidence being adduced in this cause as to the law of *Scotland*, their Lordships would order the payment to be made as sought. A question of Scotch law being one of fact, was not to be decided by authority, but by evidence in each cause.

An

(a) *Ans.* 63.

(b) 3 *Ves.* 321.

(c) *Jac.* 544.

(d) 2 *Myl. & K.* 513.

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An opinion, verified by affidavit, was produced thereupon an order was made for payment to the signee.

In the Matter of the 10 & 11 VICT. c. 96;

and

In the Matter of the Trusts of a Legacy bequeathed by the Will of PETER THOMPSON the 1st  
*Ex parte* JAMES TUNSTALL and ANTHONY TUNSTALL.

May 8.

Before The  
LORDS JUSTICES.

THIS was an appeal from the decision of Vice-Chancellor Wood on a petition under the above act

A testator bequeathed a sum of stock in trust for a daughter for life, and in case there should be no child of the daughter living at her decease, or being such, they should all die under twenty-one, then the testator bequeathed the stock unto all and every his children then living, and the child or children of such of his said chil-

dren as should be then dead in equal shares, but so that such his grandchildren only have among them such share as their parents would respectively have entitled to in case they had been then living:—*Held*, that children of a child testator, known by him to be dead at the date of the will, did not take any into

*Peter Thompson* the elder, by his will dated the 1st of February 1837, bequeathed to trustees 15,000*l.* 10*s.* 6*d.* per Cents. in trust to pay the dividends and profits unto his daughter, *Elizabeth Sutton*, for her life until she should assign, incur or anticipate the same for her separate use, and after the decease of *Elizabeth Sutton*, or if she should sell, assign, incur or anticipate the dividends, upon trust to transfer the same amongst all her children, to be equally divided between them, the shares of the children to be transferred at their respective ages of twenty-one years; and the testator declared that if any such children should die under twenty-one, the share of him, her or them so dying should go to the survivor or survivors of them as

time as his, her or their respective original share or shares should become payable.

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The will then proceeded thus :—" And in case there shall be no child or children of my said daughter living at the time of her decease, or of any sale, assignment, or incumbrance or anticipation by her, or being any they shall die under the age of twenty-one years, then I give and bequeath the said sum of 15,000*l*. Three per Cent. Bank Reduced Annuities unto all and every my children then living, and the child or children of such of my said children as shall be then dead, in equal shares and proportions, but so that such my grandchildren shall only have and be entitled among them to such share or shares as their parent or parents would respectively have been entitled to in case they had been then living." And the testator bequeathed to the same trustees the further sum of 10,000*l*. Three per Cents. upon and for the same trusts, intents and purposes, and subject to the like restrictions and limitations in favour and for the benefit of his daughter *Griscilla Ann Rachel Metcalf*, widow, and her issue; and in default of issue, for the benefit of the testator's children and their issue, as were therein before expressed and declared of and concerning the said sum of 15,000*l*. Three per Cent. Reduced Annuities bequeathed for the benefit of Mrs. *Sutton* and her issue; and in default of issue, in favour of the testator's other children and their issue, or as near thereto as the deaths of persons and other circumstances would admit.

At the dates of the will and of his death the testator had only five children, but had had three other children, of whom one was *Mary Ann Tunstall*.

*Mary Ann Tunstall* left issue her surviving three children, the Petitioners and *Peter Edward Tunstall*,  
and

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and the question was, whether they were entitled to participate in the legacy bequeathed in favour of Mrs. *Metcalf* for life, she having survived the testator and died in April 1853, without ever having had any issue.

The Vice-Chancellor made an order, declaring that, according to the true construction of the will, the children of children of the testator, who died before the date of the will, took no interest in the 10,000*l.* Reduced Annuities, and that in the events which had happened that sum was divisible between the four children of the testator, who were living at the death of Mrs. *Metcalf*.

From this decision one of the Petitioners appealed.

Mr. *Walker*, Mr. *Amphlett* and Mr. *Haynes*, in support of the appeal.

They referred to *Christopherson v. Naylor* (a); *Butter v. Ommaney* (b); *Waugh v. Waugh* (c); *Thornhill v. Thornhill* (d); *Smith v. Smith* (e); *Le Jeune v. Le Jeune* (f); *Bebb v. Beckwith* (g); *Tytherleigh v. Harben* (h); *Gas-kell v. Holmes* (i); *Giles v. Giles* (k); *Jarvis v. Pond* (l); *Boon v. Cornforth* (m); *Clay v. Pennington* (n); and contended that the word "said" did not confine the description of children to those living at the date of the will, but that the words "said children" must mean the testator's children generally, there being nothing to confine its import, and the probability being that the testator did not intend to exclude any grandchild whose parent was dead at the period of distribution.

Mr.

- (a) 1 *Mer.* 320.
- (b) 4 *Russ.* 70.
- (c) 2 *Myl. & K.* 41.
- (d) 4 *Madd.* 377.
- (e) 8 *Sim.* 353.
- (f) 2 *Keen*, 701.
- (g) 2 *Beav.* 308.

- (h) 6 *Sim.* 329.
- (i) 3 *Hare*, 438.
- (k) 8 *Sim.* 360.
- (l) 9 *Sim.* 549.
- (m) 2 *Ves. sen.* 277.
- (n) 7 *Sim.* 370.

Mr. *Chandless*, Mr. *Sidebottom*, Mr. *Haldane* and  
Mr. *Selwyn*, were for the Respondents.

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*The LORD JUSTICE KNIGHT BRUCE.*

But that the learned Judge before whom this cause came originally, and to whose opinion so much weight ought to be given, considered the point doubtful, I confess that I should have thought the case a clear one; I agree with the decision.

*The LORD JUSTICE TURNER.*

The question whether the children of a child of the testator, known to him to be dead at the date of his will, is entitled under this bequest, "to the issue of such of them as shall be then dead." In *Tytherleigh v. Harben* (a), the gift was not to the testator's children, but to children, some of whom might come into existence after the testator's death. I think the Appellant not entitled, but the state of the authorities has left such questions in some difficulty.

Appeal dismissed without costs.

(a) 6 Sim. 329.





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In the Matter of CAMERON'S COALBE  
STEAM COAL, and SWANSEA and LOUC  
RAILWAY COMPANY,

and

In the Matter of the JOINT-STOCK COMPA  
WINDING-UP ACTS, 1848 and 1849.

April 29.

May 1, 2, 5,  
11.Before The  
LORDS JUS-  
TICES.

The deed of settlement of a Joint-Stock Company provided for the transfer of shares, with the approbation of the Directors. Some of the shareholders threatened to take proceedings to set aside a purchase and lease for fraud, whereupon the Directors agreed with them that they should be allowed to transfer their shares on pay-

ment to the Company of a sum, out of which a claim of one of the Directors the Company should be satisfied. The money was paid and the claim satisfied, and the shares transferred to nominees of the Directors for a nominal consideration. *Held*, that the transaction was inconsistent with the duty and beyond the powers of the Directors, and that the shareholders were, notwithstanding the transfer, placed on the list of contributories under the Winding-up Acts.

Directors of Joint-Stock Companies are in a sense trustees.

**BENNETT'S Case.**  
**T**HIS was an appeal from the decision of the Court of the Rolls, refusing a motion, made on behalf of the Appellant, to remove his name from the list of contributories of the above Company.

The case is reported in the 18th volume of *Milner's Reports* (a), where the facts are fully stated. The following summary of them is transposed to this from the commencement of Lord Justice *Turner's* judgment:—

The Company was formed in the year 1845, for the purpose of working some coal mines under the name of Colonel *Cameron*. A lease of the mines had been previously granted to *William Booth Cameron*, one of the sons of Colonel *Cameron*. By an indenture of the 11th of November 1845, the Company agreed to purchase

(a) Page 339.

i

interest of *William Booth Cameron* under this lease for 150,000*l.*, and the lease having been surrendered, the Company became lessees of the mines under Colonel *Cameron* for a long term of years.

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By the Company's deed of settlement, the capital was to be 200,000*l.*, divided into 20,000 shares of 10*l.* each; 7,000 of which were taken by *W. B. Cameron* in part of the purchase-money. The following were the material articles of the deed:—

“ 48. That the Board of Directors shall carry into effect the objects and purposes of the Company as herein set forth, and also carry into effect the provisions of the said hereinbefore recited indenture of the 14th *November* instant, and in accordance therewith pay or cause to be paid to the said *W. B. J. P. Cameron*, his executors, administrators or assigns, the residue of the said sum of 150,000*l.* in the manner therein mentioned, and shall from time to time purchase in fee simple, or for any less estate, or take upon lease, or otherwise procure, any such messuages, tenements, lands, hereditaments and premises, with their appurtenances, as they shall from time to time think necessary for carrying out the objects and purposes of the Company, and shall also at any time or times hereafter sell, let, demise or exchange all or any part or parts of such messuages, tenements, lands, hereditaments and premises, or of the messuages, tenements, lands, hereditaments and premises of which the Company are now possessed or entitled to the possession of under and by virtue of the indenture of this date hereinbefore recited, as shall not be required by them for the purposes of the Company; and shall receive and give discharges for all monies to arise from the sale or exchange or other dealings with such messuages, tenements, lands, hereditaments and premises, or any of them, or any part or parts thereof;

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thereof; and may also from time to time enter into ~~an~~ such contracts, and may purchase or hire all such ~~ma-~~ chinery, engines, carts, carriages, horses, and ~~othe-~~ articles as may be requisite for working of the said ~~mine-~~ and collieries, and for the construction and maintainan~~ce~~ of the said railway, and any other branch or branches ~~to~~ be made in connection therewith; and shall also from ~~time~~ time to time enter into all such contracts and agreements ~~to~~ for the working and carrying on the said mines and col- ~~li-~~ eries, and for the sale or vend of coal, coke, culm, ~~an-~~ ironstone, iron ore, lead, tin, copper, manganese, fire ~~an-~~ clay and other mines, metals, minerals and ores to be ~~be-~~ gotten, raised or made from the same, and also for the ~~u-~~ use of the said railway and branches thereof, and of the ~~u-~~ carriages, locomotive or other power employed in carry- ~~ing~~ ing on the traffic thereon respectively; and shall also maintain such carriages or other locomotive power for the conveyance of goods and passengers thereon respectively; and shall do all acts, matters and things in their discretion, and in such manner as shall appear to them most expedient and beneficial for the Company."

"108. That the holder of any share or shares in the capital of the Company, whether such holder shall be a copartner, or the husband, executor, administrator, or the assignee of any female deceased, bankrupt or insolvent copartner, shall be at liberty to procure some other person or persons to become a copartner or copartners in respect of all or any of the shares held by him or her, on which share or shares no arrear of instalments shall be due and unpaid, or to sell his or her share or shares to the Company."

"109. That whenever any such holder or holders shall have procured some other person or persons to become a copartner or copartners in respect of all or any of the  
 shares

shares held by him, her or them in the capital of the Company, he, she or they shall give notice in writing to the Board of Directors at the office of the Company in London, and shall describe in such notice the name and residence of the proposed copartner or copartners, and the number or numbers of the share or shares in respect of which he, she or they shall have procured such person or persons to become a copartner or copartners; provided that no such holder or holders shall be entitled to procure any other person or persons to become a copartner or copartners in respect of all or any of the shares held by him, her or them, unless or until such holder or holders shall, to the satisfaction of the Board of Directors, settle and close all outstanding or unsettled accounts or liabilities whatsoever between himself, herself, or themselves and the Company."

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" 110. That whenever the holder or holders of any share or shares shall be desirous of selling to the Company any share or shares in the capital of the Company, and shall give such notice in writing to the solicitor of the Company of his or her or their desire as herein provided for, it shall be lawful for the Board of Directors, with the authority and sanction of a general meeting of the copartners duly convened, to purchase out of the funds or property of the Company for the benefit of the copartners, and in the name of the Company, at such price or prices as the Board of Directors shall deem fair and reasonable, all or any of the share or shares which the holder or holders giving such notice shall be desirous of selling; and immediately on the completion of such purchase the Board of Directors shall cause such entry, erasure or other alteration in the share register-book as they shall think fit, for the purpose of making it appear thereon that such holder or holders is or are no longer entitled to such share or shares, and, after such entry,  
erasure

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erasure or other alteration shall have been made, the Board of Directors shall at any time, on the requisition of such holder or any one or more of such holders, and at his, her or their expense, deliver to him, her or them a certificate in writing signed by one or more of the Directors of such entry, erasure or other alteration."

"117. That whenever such notice as herein mentioned by any holder of any share or shares in the capital of the Company, being the husband of the female copartner, or any executor or administrator of a deceased copartner desirous of becoming, or having procured some person or persons to become a copartner or copartners in respect of all or any of the shares held by him or her in any of those capacities, or by any holders, being the assignees of a bankrupt or insolvent copartner, having procured some person or persons to become a copartner or copartners in respect of all or any of the shares held by them in that capacity, or by any holder, being a copartner, having procured some person or persons to become a copartner or copartners in respect of all or any of the shares held by him or her, shall have been left at the office of the Company of the Board of Directors, or in the interval of their meeting, the secretary shall proceed, without delay, to take such notice into consideration, and shall, under the hands of one or more of the Directors, certify in writing to the holders or holder giving notice of their approbation or disapprobation of the proposed copartner or copartners, and shall, if the person or persons proposed in such notice shall be approved of in the case of a holder or holders desirous of becoming a copartner or copartners, forthwith on such approbation being certified as aforesaid, or in case of any holder or holders procuring some person or persons to become a copartner or copartners as aforesaid, forthwith on the deed or deeds by which such share or shares shall have been  
been

**been transferred, together with the certificate or certificates given to such holder or holders, under the seal of the Company as aforesaid, having been left at the office of the Company, cause, at the expense of such proposed copartner or copartners, his, her or their name or names to be entered in the share register-book as the new copartner or copartners in respect of such share or shares, and shall, at the same time, and at the like expense of such new copartner or copartners, cause a memorial of every such instrument of transfer to be entered in a book to be called "The Register of Transfers," and the entry thereof to be endorsed on the instrument of transfer, and shall, at the same time and at the like expense, cause to be prepared a deed, whereby such new copartner or copartners shall covenant with the Company to abide by the rules, orders and regulations thereof as contained in these presents, or any supplementary deed of settlement of the said Company, and shall, immediately after the execution of such deed of covenant by such new copartner or copartners, deliver to him, her or them the certificate or certificates under the seal of the Company hereinbefore required to be delivered to every copartner in the said Company."**

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In the year 1848, great differences arose among the shareholders, a large body of them, (who in the argument were called the dissentient shareholders,) being of opinion that the lease and the purchase could be impeached for fraud, and threatening proceedings for the purpose of setting them aside and dissolving the Company; and a rather larger body of them considering that the concern would turn out to be profitable, if the Company could be relieved from some claims which were then pressing upon it.

In this state of circumstances a negotiation, having  
for

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for its object the transfer of the shares of the dissentient shareholders, took place between them and the Directors, whose consent was necessary to the transfer, and this negotiation resulted in the following arrangement:—It was agreed that the dissentient shareholders should, in consideration of being permitted to transfer their shares, pay to the Company the sum of 8,000*l*., and lend to the Company, upon its promissory note, the further sum of 1,000*l*., that thereupon the shares of the dissentient shareholders should be transferred to persons who, it was ultimately agreed, should be nominated by the Directors to take the transfers, and that the dissentient shareholders should be released by Colonel *Cameron* and *W. B. Cameron*, from all claims under the lease and in respect of the purchase-money.

The 8,000*l*. was accordingly paid by the dissentient shareholders, and was for the most part applied in payment and satisfaction of some of the debts and liabilities of the Company, and, amongst others, in payment of some sums to Colonel *Cameron* for rent, and to *W. B. Cameron* in respect of his purchase-money. The dissentient shareholders also lent the 1,000*l*. to the Company, upon its promissory note, and, these payments being made, the shares of the dissentient shareholders were, for nominal considerations, transferred into the names of *W. B. Cameron* and Captain *Earle*, two of the Directors of the Company, who were nominated by the body of Directors to take the transfers, and who were registered as transferees. The transaction was completed by Colonel *Cameron* and *W. B. Cameron*, at the same time and as part of the transaction, executing releases to the dissentient shareholders from all claims under the lease and in respect of the purchase-money.

Upwards of 3,000 shares in the Company were transferred

ferred into the names of *W. B. Cameron* and Captain *Earle*, under this arrangement. Twenty of the shares so transferred belonged to the Appellant.

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Sir *F. Thesiger*, Mr. *Lloyd*, Mr. *Selwyn*, and Mr. *Willes*, for the Appellant.

First. The case of fraud on which the Respondents relied is not sustained; secondly, if the transaction really was a purchase by the Company, which we submit it was not, still the evidence shows that the Appellant had no notice of that circumstance. He states on affidavit, and is not contradicted, that he believed the transfer was made to Mr. *William Booth Cameron* and Mr. *Earle*, in trust for Mr. *William Booth Cameron*. This being the case, it is not material whether the purchase was really made on behalf of the Company or not. In *Hollwey's Case* (a) the uncontradicted deposition of the transferor that he had no actual notice that the transferee was not purchasing on his own account, was held sufficient to distinguish the case from that of *Morgan* (b), and to exclude the transferor from the list of contributories; thirdly, the circumstance of the *Camerons* receiving part of the consideration paid for the approval of the transfer by the Directors, did not invalidate it, for this application of the money was only in accordance with the 48th article of the deed of settlement. If the Directors had individually received a sum of money for giving their consent, that would have been a different state of things. The Directors and the dissentient shareholders constituted a majority of the Company, and could have passed a resolution at a general meeting to authorize the purchase of shares by the Company if that had been intended, but this was really not the object of the transaction. The transferees meant to take the shares,

but

(a) 1 *De G. & Sm.* 777.  
Vol. V.

X

(b) 1 *Mac. & Gor.* 225.  
D. M. G.



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but as the transferrors were retiring, while there w liabilities of the Company unprovided for, it was reasons for the Directors not to sanction their withdrawal with making some provision for those liabilities, and as to Directors nominating the transferees, that was surel proper precaution in the existing state of circumstan [The LORD JUSTICE KNIGHT BRUCE: The Direct had a discretion to be exercised for the benefit of t Company. Was it within their power, or was it proper exercise of their functions, to sell this disc tion, even if the money was applied for the benefit the Company?] [The LORD JUSTICE TURNER. Do the 117th article apply to any case except a trans under ordinary circumstances? Or can it be held apply to a case where the transfer is part of an arrang ment between the Directors and a large body of dissa tient shareholders for settling a question between th and the Company?] We submit that there is nothi to confine the general terms of the article. Assumi the consent to have been properly given, it was not ul vires. As to its having been properly given, we sugg such a case as this:—Suppose a shareholder of gr wealth was, from personal circumstances, anxious retire; would it be improper for the Directors to s “We know that you are extremely desirous of retir but before we part with a shareholder whose respor bility is so well known, and affords such support to Company, we require you to contribute towards p viding for its liabilities?” Would it not be a fair exerc of the discretion reposed in the Directors to make su a stipulation? If the transferee were a proper pers would the transferror’s making such a contribution validate the transfer? Lastly, the mere omission of so of the formalities prescribed by the articles was not su cient to invalidate the transaction.

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They referred to *Straffon's Executors' Case* (a) *Crosfield's Case* (b), *Meux's Executors' Case* (c), and *Cope's Case* (d).

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Mr. Roundell Palmer and Mr. Roxburgh, for the Official Manager, and Mr. W. W. Cooper, for other Respondents.

The transaction was really a bargain for the approval of the Directors to the retirement of the Appellant and the other dissentient shareholders, in consideration of a sum paid to the Camerons. There was, in substance, no transfer of shares. The shares were bought on behalf of the Company, without the authority and sanction of a general meeting, an omission which cannot be regarded as one of a merely formal part of the transaction. Even if the Appellant had no personal knowledge that this was the case, his solicitor, by whom the transaction was conducted, had notice of the fact from the negotiations which took place. The case therefore falls not within *Hollway's Case* (e), but within *Morgan's Case* (f), *Lawes's Case* (g), and *Stanhope's Case* (h).

Sir F. Thesiger, in reply.

The LORD JUSTICE KNIGHT BRUCE.

May 11.

This may seem a hard case on Mr. Bennett, the Appellant. Perhaps it is so; but the meaning and intention of the arrangement effected in 1849 (of which the transfer made by him of the twenty shares in question formed a portion) were, on the part of the shareholders,

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| (a) 1 De G. M. & G. 576. | (e) 1 De G. & Sm. 777.   |
| (b) 2 De G. M. & G. 128. | (f) 1 Mac. & Gor. 225.   |
| (c) 2 De G. M. & G. 522. | (g) 1 De G. M. & G. 421. |
| (d) 1 Sim. (N.S.) 54.    | (h) 3 De G. & Sm. 198.   |

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holders, called the dissentient shareholders, including Mr. *Bennett*, and equally on the part of Colonel *Cameron* and his sons, and the Directors of this Company, not that the dissentient shareholders should sell their shares, nor substantially that any other thing should be done than that they should pay 8,000*l.* or 9,000*l.* in a particular manner agreed upon; and, in consideration of that payment, be separated and released from the Company, and freed, as far as Colonel *Cameron* and his sons and the Directors could free them, from all liability in respect of its debts and transactions. The particular form and mode of carrying the design into execution were a secondary and subsidiary matter. The form and mode, in fact, were that the dissentient shareholders transferred their shares to Mr. *William B. Cameron* and Captain *Earle*, two gentlemen selected for the purpose by the Directors.

I think it not necessary for us to decide, and I do not mean to intimate an opinion, whether Mr. *William B. Cameron* and Captain *Earle* took the shares on their own account, or on the account of either, or merely on behalf of the Company, or of the Directors as a body representing the Company; though if this last was the intention, the Company was not bound by it; there having been no assent of a meeting of shareholders. But, whatever may have been the meaning or views of the Directors in the matter, it is asserted on one side and denied on the other, in the present controversy, that the Company became compellable to treat and look to Mr. *William B. Cameron* and Captain *Earle* as the owners of the transferred shares, and had not the right to regard the transfers to them as ineffectual for the purpose of releasing or discharging Mr. *Bennett* and the shareholders similarly circumstanced.

It appears to me, however, that the Respondents, who deny this proposition, are well founded in doing so; for, whatsoever the character in which it was meant that Mr. *William B. Cameron* and Captain *Earle* should hold the shares, the nature and substance of the business were, I think, essentially contrary in spirit to the laws of the Association.

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The Directors' assent to the transfers (an assent necessary to their validity) was given, not from any notion or opinion of the fitness or eligibility of Mr. *W. B. Cameron* or Captain *Earle*, as a shareholder or larger shareholder, in the ordinary or regular course, but was sold to the dissentient shareholders for the mere purpose that they might be released from their obligations to the Company. How could it have been correct—how could it have been consistent with the true meaning of the deed regulating the administration of the affairs of the Company, or with the duty of the Directors, to sell their right of objecting to a person proposed to become a new shareholder by a transfer from an existing shareholder; even though the money to be thus obtained was not (and I have not said whether I think that it was) to be corruptly applied? What power had they to set a price on the deliverance of shareholders? What right to ransom? What authority, in a word, to alter the terms on which alone, according to the meaning of the deed, a new could be substituted for an old shareholder? The arrangement was a combination to defeat at least one material and important provision of the deed, and was therefore, in effect, a fraud upon the Company on the part of all concerned in it. And this, I say, without using the word "fraud" in an offensive sense, and especially without comparing the case to one unhappily not very rare,—that of a servant bribed to allow his master to be cheated. But though there were

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were (I am satisfied) some individuals engaged in this affair of 1849, who would have recoiled with detestation from such a notion, if plainly presented to their minds, I am, in truth, not so well satisfied whether, upon examining and probing the whole business thoroughly, the distinctions between that case and the present, for any purpose directly material in the litigation now before us, are not more apparent than real.

It seems to me that Mr. *Bennett* has been reasonably and justly held by the Master first, and the Master of the Rolls afterwards, to be a contributory. But as we mean, we may perhaps as well declare in our order that we mean, to leave unprejudiced and unaffected the rights of Mr. *Bennett* and the other dissentient shareholders, not only against the Company in respect of the 8,000*l.* or 9,000*l.* paid in the remarkable manner shown by the evidence, but also generally against Messrs. *Cameron*, Mr. *Elderton* (who is or claims to be a creditor of the Company), and all who concurred in the transaction of April 1849.

With regard to the Respondents' costs of this appeal, I am of opinion that there are circumstances rendering it fit that they should be borne by the estate of the Company, and not by the Appellant. I need scarcely add, that I consider the present order entirely consistent with what Lord *St. Leonards* said and did in the case of *Straffon's* executors.

*The* LORD JUSTICE TURNER.

In the view which I take of the question before us, it is not necessary to enter at large into the facts of this  
 case.

case. It is sufficient to state:—[His Lordship then stated the facts as above detailed.]

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BENNETT'S  
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Upon the argument before us the Appellant's case was mainly rested upon the point that there was a legal transfer of the shares; and it was contended, on his behalf, that the transaction on the part of the shareholders was in all respects a fair and bonâ fide transaction. The Respondent, the official manager, on the other hand, insisted, that the transaction, from its commencement to its termination, was fraught with suspicion and mala fides; and that, upon this ground, the transfer of the shares could not be maintained. All the facts and circumstances of the case were most minutely and laboriously examined on both sides with reference to this question of the good faith of the transaction. But, in my judgment, it is not necessary for us to give, and I do not give, any opinion upon that point. There is, as it seems to me, a much more plain and simple ground upon which this case may be and ought to be decided; and I mean to rest my decision upon that ground, and upon that ground alone.

Assuming this transaction to have been a perfectly fair and bonâ fide transaction on the part of the shareholders, was it a transaction in which the shareholders of the Company could be bound by the acts of their Directors? The Directors of these Companies are in a sense trustees. They have authority to bind the Companies to the extent of the powers given to them by the deeds under which the Companies are constituted; but in the absence of previous authority or subsequent concurrence on the part of all the shareholders (of which there is no sufficient proof in the present case), they have not, as I apprehend, any authority to bind the Companies

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panies in any matter of substance beyond the extent of the powers which the deeds may give them. Moreover, in the exercise of the powers given to them by the deeds, they must, as I conceive, keep within the proper limits. Powers given to them for one purpose cannot, in my opinion, be used by them for another and different purpose. To permit such proceedings on the part of the Directors of Companies would be to sanction not the use but the abuse of their powers. It would be to give effect and validity to an illegal exercise of a legal power.

These are the principles by which, in my opinion, the decision of this case must be governed. We must consider, therefore, what are the powers which were given to the Directors of this Company by its deed, and what was the extent and object of those powers. The only provisions of the deed which appear to me material to be adverted to are the sections 108, 109, 110 and 117 (a). [His Lordship read these sections.]

Section 110 applies to purchases by the Company. The other sections relate to transfers by individual shareholders to other individuals. The contrast of those clauses throws some light upon the meaning of the deed. In matters which more immediately concern the interests of the whole Company, as in the purchase of shares by the Company, the whole body of shareholders is to be consulted. In matters which more nearly affect the interests of the individuals, as the transfer of their shares, the judgment of the Directors is deemed sufficient. The question, however, does not depend upon the contrast of these clauses, but mainly upon the true meaning and extent of the 108th, 109th and 117th sections; and upon examining these sections

(a) Set out *ante*, p. 285.

sections I do not think that any thing will be found more favourable to the Appellant's case. By the 109th section, parties procuring transferrees are to give notice to the Directors, and the notice is to specify the name and address of the proposed transferee. By section 117 the Directors are to take the notice into consideration, and to signify their approval or disapproval of the transfer. The context of these sections of the deed seems to me to prove that what was really intended was this:—that the Directors of the Company should be placed in a position which would enable them upon each proposed transfer to secure to the Company a solvent and responsible transferee. And at all events these sections, I think, clearly prove that each proposed transfer was to be the subject of distinct consideration, and to be judged of upon its own circumstances.

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Now what has taken place in the case before us has been this. The question before the Directors has been, not whether any one of these dissentient shareholders should be permitted to transfer, but whether the whole body should be permitted to go out together, a question involving many considerations, which would not apply to the retirement of an individual shareholder, and which these sections, giving power to the Directors over separate transfers, did not authorize them to take into their consideration. And this is not the whole case, for the releases of the dissentient shareholders by Colonel Cameron and *W. B. Cameron* were parts of this transaction, and it appears, upon the face of those releases, that what the parties had been proceeding upon was the settlement of the disputes and differences between the shareholders. Surely the sections to which I have referred cannot be construed to have constituted the Directors judges of what was expedient to be done in consequence



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CASE.

sequence of these disputes and differences, and to empower them to settle the terms upon which they should be arranged. In truth, the powers given by this deed to the Directors to give or withhold their consent to transfers have been wrested to the purpose of enabling the Directors to carry out an arrangement contrived and disguised for the purpose of effecting the retirement of a large body of the shareholders; and it is clear that these powers have been so used with the knowledge of *Bennett* and of those associated with him.

I am of opinion that such a use of these powers was not warranted, and that the transfer, therefore, cannot stand. It was urged, on the part of the Appellant, that the arrangement was for the benefit of the Company, as it afforded the means of set-off against the purchase-money due to *W. B. Cameron*; but the answer to this argument is, that unless the Directors had power to make the arrangement, it was for each shareholder to judge of what was most for his benefit, and the Directors had no power to determine that question.

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HINDSON v. WEATHERILL.

May 29, 30.

Before The  
LORDS JUSTICES.

**T**HIS was an appeal from the decision of Vice-Chancellor *Stuart*, declaring that a solicitor of a testator, to whom the testator by his will and codicil had made gifts of realty and personalty, was a trustee of these gifts for the testator's heir-at law and next of kin. The case is reported in the second volume of Messrs. *Smale* and *Giffard's Reports*, page 604, and the facts are there fully stated. The following is a short summary of them :—

An attorney had advanced to a client in humble circumstances the necessary funds to prosecute actions of ejectment, which were conducted by the attorney, and terminated in a compromise, on which the client received a large sum of money. During the proceedings the widow of the client's brother wrote

The testator *John Hindson* was, in 1844, a farmer-labourer. He employed Mr. *Weatherill*, the Appellant, in that year as his attorney in two actions of ejectment to try the validity of a will of one *Richard Hindson*, whose heir-at-law the testator was, and to recover certain lands at *Tolsby*. The Appellant supplied the requisite funds for these proceedings, pending which the testator applied to

some of the client's brother wrote a letter to the client saying that she had little money to spare, but wished to do all she could so that justice might be done to every branch of the family. The attorney wrote an answer to this letter by the client's direction, saying, that if the client succeeded, substantial justice should be done to all to whom the client was related. Neither the brother's widow, nor any of the client's relatives, gave him any assistance in prosecuting the actions. The attorney, by his directions, prepared a will, which the client executed, and under which the attorney took large benefits, but in which benefits were also given to relatives of the testator. It did not appear that the letter of the brother's widow, or the answer to it, was referred to in the course of the preparation of the will either by the attorney or the client :—*Held*,

1. That the will was not made under any mistake or misapprehension caused by the attorney.
2. That the circumstance of a solicitor preparing for a client a will containing dispositions in his own favour, does not of itself take away the right of the solicitor to be for his own benefit a devisee or legatee.
3. That the considerations applicable to a gift inter vivos from a client to his solicitor are not universally applicable to a testamentary disposition.

Where a Defendant tendered himself for examination *vivâ voce* below, and the Plaintiff opposed his examination, the Court of Appeal declined acceding to a proposition of the Plaintiff to examine him.

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 HINDSON  
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some of his relatives for assistance, but without obtaining any from them. One of them, however, named *Margaret Hindson*, the widow of *Robert Hindson*, the testator's brother, wrote to *John Hindson* a letter, in which she said "You, of course, are the person most interested, as I consider you without doubt the heir to the landed property. You dying without an heir, my son *Thomas Robert Hindson* would succeed you as heir to the landed property. I know I have no claim upon anything myself but I am interested for my children. I hope you will exert yourself in the cause that justice may be done. I have little money to spare; but in this case I wish to do all I can that justice may be done to every branch of the family. It is many years since I heard anything from you, but I hope you will answer this." To this letter *John Hindson* sent an answer, written at his direction by Mr. *Weatherill*, and signed by himself, in which he said, "If I succeed in setting the will aside, substantial justice shall be done to all parties to whom I am related."

The action was compromised by the payment to the testator of 4,200*l.* and the costs, amounting to about 1,000*l.* more.

After this, in *July* 1850, the testator sent for Mr. *Weatherill*, and gave him instructions for the will in question. He said that he wished to confirm by it a gift which he had previously made to Mr. *Weatherill* of a promissory note for 1,000*l.* The will was prepared and read over to the testator, who then said that he had changed his mind as to certain property at *Tolsby*, that he did not know his *London* relatives even by name, and had never seen them; that they had rendered him no assistance in procuring the property which he had to dispose of; and that he would, therefore, alter in the Appellant's favour the devise of his property at *Tolsby*. The  
 Appellant

**A**ppellant desired the testator not to make any alteration in his will, so far as he the Appellant was to benefit thereby, but the testator insisted on the alteration, which the Appellant at length consented to make, on condition that a third person should be present to hear the testator's wishes before the will was executed.

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An old friend of the testator, named *Reade*, accordingly attended, and after the will so altered was read over to the testator, said to him, "Now, *John*, is this disposition of your property as you wish it to be?" The testator replied, "Yes, it is; and I would have done more for him (the Appellant) if he would have let me."

The will was dated the 18th of *July* 1850, and thereby, after bequeathing various legacies, the testator confirmed the gift of the 1,000*l.* advanced on the promissory note. He then devised the lands at *Tolsby* to the Appellant and one *John Redman* during *John Redman's* life, the rents to be equally divided between them. At *John Redman's* decease the testator devised the premises unto and to the use of the Appellant, and his heirs and assigns for ever; and he gave all his personal estate to the Appellant and *William Wilkinson*, whom he appointed his executors, upon trust to call in and convert the same into money, and thereout to pay his debts, funeral and testamentary expenses, and certain legacies, and to divide the clear residue into four parts, and to pay and divide the same between the children of his sister *Sarah Jackson*, and of his brother *Robert Hindson*, and his sister *Elizabeth Cole* and her children, and *Hannah Hindson* and her child, in manner in the will expressed.

By a codicil dated the 25th of *October* 1850, the testator, after revoking the residuary bequest of his personal estate, directed that the whole of the interest and dividends

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dends of his personal estate should be paid to his two sisters, and the survivor of them, for their lives respectively; and after the decease of the survivor of them, he directed his executors, after setting apart a legacy of 100*l.* to divide the residue among the children of his sister and brother, *Mary Jackson* and *Robert Hindson*, both then deceased, and of his sister, *Elizabeth Cole*.

The testator died on the 14th of *January* 1851, a bachelor. His only brother, *Robert Hindson*, died in his lifetime, and the Plaintiff, *Thomas Robert Hindson*, was the eldest son of *Robert Hindson*, and the heir-at-law of the testator. The Plaintiff entered a caveat in the Ecclesiastical Court, at *York*, to stay the probate; and a suit had been prosecuted in that Court by the executors, to establish the will and codicil, which were established by a decree directing probate to be granted to the executors on the 16th of *December* 1851.

The Plaintiff then filed the present bill, praying for an account of the personal estate of the testator, and for declarations that notwithstanding the transfer and indorsement of the promissory note for 1,000*l.*, the same formed part of the estate of the testator; that the devise of the hereditaments at *Tolsby*, so far as respected any estate and interest of the Appellant therein, was void, and that he was to the extent of such estate and interest a trustee for the Plaintiff as the heir-at-law of the testator.

The answer of the Appellant stated to the above effect, and further stated that the testator, though he was when first known to the Appellant a farm-labourer, was the son of a farmer, and that he was a man of ordinary education in that station; that he was an intelligent person; that after his accession to his fortune he devoted  
 himself

himself to sporting, but that he was not a person of intemperate habits as was alleged by the bill; that the testator resided at a distance of several miles from the Appellant; that the gift of the promissory note was spontaneous, and accompanied by expressions of gratitude, and that the testator repeated these expressions frequently; that he was estranged from his relatives with whom he had kept up no intercourse; and that the will was exactly in conformity with the instructions of the testator.

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Mr. *Daniel* and Mr. *Renshaw*, for the Plaintiff.

The Vice-Chancellor's decision is founded upon the general principle, well established by authority, that the burden of proving the fairness of a gift from a client to a solicitor is upon the solicitor. Here the solicitor has not discharged himself of this burden; on the contrary, it appears that the client was labouring under an error as to the conduct of his relatives, of which error the Appellant was fully cognizant, as he had written the answer to Mrs. *Robert Hindson's* letter. The Appellant cannot retain a benefit so obtained, *Huguenin v. Baseley* (a).

In *Houghton v. Houghton* (b) the Master of the Rolls said, "I am of opinion, as I lately held, in a case of *Cooke v. Lamotte* (c), that whenever one person obtains, by voluntary donation, a large pecuniary benefit from another, the burden of proving that the transaction is righteous, to use the expression of Lord *Eldon*, in *Gibson v. Jeyes* (d), falls on the person taking the benefit. But this proof is given, if it be shown that the donor knew and understood what it was that he was doing. If, however,

(a) 14 *Ves.* 273.

(b) 15 *Beav.* 278—298.

(c) 15 *Beav.* 234.

(d) 6 *Ves.* 266.

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ever, besides obtaining the benefit of this voluntary gift from the donor, the donor and donee were so situated towards each other, that undue influence might have been exercised by the donee over the donor, then a new consideration is added, and the question is not, to use the words of Lord Eldon, in *Huguenin v. Baseley* (a) 'whether the donor knew what he was doing, but how the intention was produced;' and though the donor was well aware of what he did, yet if his disposition to do was produced by undue influence, the transaction would be set aside." [The LORD JUSTICE TURNER referred to *Bulkley v. Wilford* (b), and *Allen v. McPherson* (c) [The LORD JUSTICE KNIGHT BRUCE. Is it disputed whether as to real estate a question of this kind would be triable in an issue *devisavit vel non*?] We submit that it is a proper subject for the decision of a Court of Equity. [The LORD JUSTICE KNIGHT BRUCE. If a man has obtained a devise or bequest in his favour by means of a promise, he may, I suppose, be compelled to perform the promise by a Court of Equity. But has a Court of Equity hitherto interfered with testamentary dispositions on the ground of fraud of the description imputed to the Appellant? His Lordship referred to *Muckleston v. Brown* (d); *Billage v. Southee* (e); *Sturges v. Gaby* (f); *Segrave v. Kirwan* (g); and *Wells v. Middleton* (h); and inquired whether the attention of the Vice-Chancellor had been called to a branch of the last-mentioned case, which came before the Ecclesiastical Court (i).] It was not: nor to *Ingram*

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(a) 14 Ves. 300.

(g) 1 Beatt. 157.

(b) 2 Cl. &amp; F. 102; 8 Bli. (N. S.) 111.

(h) 1 Cox, 112; 4 Bro. P. 245 (Toml. edit.)

(c) 1 Phil. 133; 1 H. of L. Ca. 191.

(i) *Middleton v. Forbes*, cited by Sir J. Nicholl in *Ingram v. Wyatt*, 1 Hagg. 395. See also

(d) 6 Ves. 52.

*Jones v. Godrich*, 5 E. F. Mo. p. 20, where Dr. Lushington,

(e) 9 Hare, 534.

(f) 2 De G. Mac. &amp; Gor. 623.

*Wyatt* (a) in which that case is stated, but which we submit shows that in such a case as the present adequate relief could not be obtained in the Ecclesiastical Court. What the cases show is, that if the fraud is one which affects the question of testacy, and prevents the will from expressing the testator's intention, it is a question for the Ecclesiastical Court *Gingell v. Horne* (b), but that where the testamentary intention, as to a particular legacy, existed, but was produced by the absence of proper advice, on the part of the legatee (being a person whose duty it was to give such advice), the Ecclesiastical Court cannot in such a case give adequate relief. Lord *Lyndhurst* thus distinguishes *Allen v. McPherson* (c) from *Segrave v. Kirwan* (d), saying, that in the latter case the Ecclesiastical Court could not, on the question of probate, have applied the proper remedy (e). In *Barnesly v. Powell*

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giving the judgment of the Judicial Committee of the Privy Council, said, " So, when a will is made in favour of a medical man in whose house the testatrix is resident, the Court must be upon its guard against undue influence, for practising which there is so much opportunity: and where a will under such circumstances is made by a solicitor, who had no previous knowledge of the deceased, the Court must be sure that he distinctly understood her and acted as her agent, and not as the agent of the legatee who sent him. The law of England has prescribed no restrictions upon testamentary dispositions, as to who may be the legatees. Where that power is exercised in favour of guardians, trustees, solicitors, medical at-

tendants, or persons standing in a similar relation to the deceased, the degree of proof required will be greater or less according to circumstances; but if the Court be satisfied that there was adequate capacity, testamentary intention, untainted by fraud, and a due execution, the instrument is valid. Fraud cannot be presumed, but the circumstances may render fraud so probable, that the Court will require stronger proof than in cases where all natural presumptions are in favour of the disposition, and the free will of the testator." See also *Ex parte Fearon*, 5 Ves. 645.

- (a) 1 Hagg. 384.
- (b) 9 Sim. 539.
- (c) 1 H. of L. Cas. 191.
- (d) 1 Beatt. 157.
- (e) 1 H. of L. Cas. 214.



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*Powell* (a) this Court interfered on the ground of fraud [The LORD JUSTICE TURNER. That was a case of fraud in obtaining probate]. But the Court held that the fraud created a trust on which it could act, although the probate was invalid, and might be set aside in the Ecclesiastical Court. In *Ingram v. Wyatt* (b), the case in which *Middleton v. Forbes* is cited, Sir J. Nicholl said, "The averment to be contained in a common condition is, that the testator was 'of sound mind, memory and understanding—talked and discoursed rationally and sensibly, and was fully capable of any rational act requiring thought, judgment and reflection.' Here is a legal standard. When all this can be fully predicated of the person, bare execution is sufficient; but if it cannot be truly predicated, a deficiency of capacity exists—a deficiency not necessarily rendering the person incapable but, in proportion to the degree of deficiency requiring clearer and more direct proof of the unbiased testamentary intention." That shows that the Ecclesiastical Court could not entertain such a question on this. [The LORD JUSTICE KNIGHT BRUCE. Is Sir Nicholl, in that part of his judgment, speaking or merely speaking of mental capacity (c)? Would he have applied such a criterion to a question of fraud? Suppose a man, when instructing his attorney to make his will, to say to the attorney, "I know that my nephew is dead and I shall leave my property to you;" and suppose the attorney to be aware of the nephew being alive, and t

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(a) 1 *Ves. sen.* 284.

(b) 1 *Hagg.* 401.

(c) See as to fraud the earlier part of the judgment, where Sir J. Nicholl cites cases in equity upon instruments inter vivos; from which it may be inferred

that the principles on which Courts of Equity proceed in questions of undue influence acted upon by the Ecclesiastical Courts so far as such principles are applicable to wills. See also pp. 398 to 400 of the Report.

say nothing. Would the will be good at law?] We submit that it would be bad at law and in equity too. [The LORD JUSTICE TURNER referred to *Jones v. Godrick* (a).]

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They then discussed at length the evidence, and contended that upon it sufficient appeared to exclude the Appellant from taking any beneficial interest under the will. They also referred to and commented on *Huguenin v. Baseley* (b); *Walmesley v. Booth* (c); *Hylton v. Hylton* (d); *Bridgman v. Green* (e); *Wells v. Middleton* (f); *Balch v. Symes* (g); *Newman v. Payne* (h); *Gibson v. Jeyes* (i); *Hatch v. Hatch* (k); *Montesquieu v. Sandys* (l); *Paine v. Hall* (m); *Podmore v. Gunning* (n); *Raworth v. Marriott* (o); *Dent v. Bennett* (p); *Nelthorpe v. Holgate* (q); *Billage v. Southee* (r); *Holman v. Loynes* (s).

Mr. Malins and Mr. Fischer, for the Appellant, were not called upon.

Mr. Kirkman appeared for other parties.

The LORD JUSTICE KNIGHT BRUCE.

May 30.

We have had an opportunity of considering this case out of Court since the argument was broken off yesterday, and are now able to dispose of it.

The

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| (a) 5 E. F. Moore, 16.       | (k) 9 Ves. 292.            |
| (b) 14 Ves. 273.             | (l) 18 Ves. 302.           |
| (c) 2 Atk. 25.               | (m) 18 Ves. 475.           |
| (d) 2 Ves. sen. 547.         | (n) 7 Sim. 614.            |
| (e) 2 Ves. sen. 627.         | (o) 1 Myl. & K. 643.       |
| (f) 1 Cox, 112; 4 Bro. P. C. | (p) 4 Myl. & Cr. 269.      |
| 245 (Toml. edit.).           | (q) 1 Coll. 203.           |
| (g) T. & R. 87.              | (r) 9 Hare, 534.           |
| (h) 2 Ves. jun. 199.         | (s) 4 De G. Mac. & G. 270. |
| (i) 6 Ves. 266.              |                            |

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The question whether, in the matter of this testator's will, the conduct of Mr. *Weatherill* was prudent, was delicate, was such as should be recommended to other solicitors for exact imitation, is not within our cognizance, and does not require to be answered on the present occasion. The question to be resolved is whether, on the assumption which must be made, that the will and codicil were duly, properly and upon sufficient grounds admitted as they were to probate, and on the assumption also that, upon an issue *devisavit vel non*, directed, the heir would have no case as to the entire will and codicil, or as to any part of either instrument, Mr. *Weatherill* ought upon the facts in evidence to be deprived in equity of all beneficial title to the real estate, and the note for 1,000*l.*, or either of them.

How the matter would have stood if undue influence, or if misrepresentation, or if suppression or any unfair dealing, had been established against him, or if it had been shown that he had omitted to perform any duty incumbent on him as the testator's solicitor or agent, it is unnecessary for me to say, for in my opinion no such thing has been done. Mr. *Weatherill* prepared his client's will, containing dispositions in his own favour. There begins and there ends the case, as I view it. But a case so beginning and so ending does not take away the right either legally or equitably of a solicitor to be for his own benefit a devisee or legatee.

It is in my opinion not shown that this testator made his will under any mistake or misapprehension, or, if he did so, that the mistake or misapprehension was one of which the existence or continuance was caused or induced by the solicitor, or is ascribable to the solicitor, or was one to the existence or continuance of which the solicitor contributed. It appears to me that upon the evidence

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the testator must be taken to have made his will as a free agent in every sense, not only as that term is understood in Courts of Law, but as it is understood in Courts of Equity also. He meant to do what he did, and there is, I think, a total absence of evidence to show that his intention in that respect was unfairly caused, unduly procured, or improperly induced. It has been argued, but in my opinion not proved, that the testator gave the instructions for his will, and made it, without a knowledge or without a recollection of Mrs. *Hindson's* letter to him, and that therefore Mr. *Weatherill* ought, before the will was signed, to have mentioned the letter to him. It appears to me that the evidence before us is well consistent with the notion, that the testator had received the letter in due course, had read it as soon as it was received, had instructed Mr. *Weatherill* to answer it as it was answered, and gave the instructions for the will, in their original as well as in their final state, with a perfect recollection of both letters; nor do I perceive any ground for inferring that Mr. *Easton's* assistance (if any) or interference in the matter of the claim which had been the subject of the compromised ejectment was not contemporaneously known to the testator, or had been forgotten by him. The testator's feelings towards his relatives, or some of them, may very possibly not have been those of a moral philosopher or an accomplished Christian, but I see no reason for believing that he had received from any of his family any service or benefit whatever, or at least any deserving gratitude on the testator's part.

As to the authorities cited, they seem to me all consistent with a conclusion in Mr. *Weatherill's* favour—it being impossible that a testamentary gift by a client to a solicitor can against the latter be liable to all the same considerations as a gift to him inter vivos would have been, though it may be open to some of them.

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And with regard, in the present instance, to the gift of the note, whether it could have been maintained independently of the will I do not say or suggest. However that may be, I think that, circumstanced as this case is, the will cured the defect (if any), the infirmity (if any), in that transaction, and was equally effectual with respect to the real estate, as to which, however, if the Plaintiff shall desire an issue, *devisavit vel non*, or an opportunity to bring an ejectment, possibly he ought to have it.

I should, perhaps, notice the application made to us by the Plaintiff's counsel for an oral examination of Mr. *Weatherill* as a witness for himself, in order to his cross-examination for the Plaintiff, before us. Whether we should have acceded to the application if Mr. *Weatherill* had not tendered himself for the purpose before the Vice-Chancellor, it is unnecessary to say, for he did so, and that course must be taken to have been opposed on the part of the Plaintiff. This seems to us a sufficient reason for not acceding to it now. Possibly on an issue directed he will be called.

*The LORD JUSTICE TURNER.*

I have considered the opinion of the Vice-Chancellor with quite as strong a desire as his Honor can have had to check dealings of this kind between solicitor and client, but I cannot venture to go to the extent of this decision. The facts of the case as they appear in evidence before us do not, in the view which I take of them, raise any question of law, for the passages which have been read in evidence from the answer of the Defendant, seems to me effectually to dispose of the whole case alleged by the bill. I give no opinion, therefore, in favour of the right to file a bill of this description, nor do I, on the other hand, intend to say that, under no circumstances, can such a bill be maintained.

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It is to be observed, however, that this is the first instance, so far as my recollection goes, in which an attempt has been made to fix a trust on a beneficial interest given by will upon purely equitable grounds, I mean on those peculiar equitable doctrines which apply to dealings between solicitor and client, and guardian and ward; and I feel some alarm at the consequences of the doctrine contended for. It is obvious that if such a doctrine can be applied to the relation of solicitor and client, it must be applied to that of guardian and ward. If then a ward, soon after he attained twenty-one, made from affectionate motives a testamentary disposition in favour of his guardian, it would, according to this doctrine, be the duty of a Court of Equity to fix a trust upon it, and to declare the guardian a trustee for the benefit of the ward's heir and next of kin. There is obviously a great distinction between the jurisdiction of this Court as applied to contracts, and as applied to testamentary dispositions. In the case of a written contract this Court can direct the instrument to be delivered up to be cancelled, but it has no such jurisdiction with respect to a will. When a will is tendered for probate, a Court of competent jurisdiction decides whether the document expresses the will and intention of the testator, and if any fraud affecting the will or intention of the testator can be proved in the Ecclesiastical Court, that Court can rectify the instrument and take out of it the particular clause to which the objection applied. So I take it that in a Court of Law, if a question of fraud arise upon a will, that question may be disposed of and redress may be obtained, whether the question affect the whole or any part of the will. Cases may indeed arise, and have arisen, in which the question as to the validity of particular dispositions could not be properly disposed of by a Court of Law, and, in cases of this kind Courts of Equity have interfered for the purpose of directing a trial.

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The only case cited in the argument which has at all appeared to me to bear upon this question, is the case of *Segrave v. Kirwan* (a). I have some recollection of having heard that case doubted with reference to the question whether it was not a case in which the Ecclesiastical Court might have interfered, but it is unnecessary to pursue this point, for the case is clearly distinguishable from the present. In *Segrave v. Kirwan* the testator had no intention to benefit *Kirwan* the counsel. He appointed him his executor, but did not know that the effect of the appointment would be to give him a beneficial interest. He intended, however, to appoint him to be executor, and it may be doubted therefore, whether the Ecclesiastical Court could have interfered. There was in that case no intention of the testator in favour of the legatee. It was not a case in which the testator intended to give a beneficial interest to *Kirwan*, for he was ignorant that he had done so.

Without intending to give any opinion upon this question, I will merely observe that, in my opinion, it must be extremely difficult to make out such a case as would render it proper for this Court to interfere for the purpose of declaring a trust affecting the beneficial interest given by a will, on such grounds as are here relied upon, and that the Plaintiff in this case has, in my judgment, failed to do so.

I concur in the conclusion to which my learned brother has come.

(a) 1 Beatt. 157.

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LOWE v. THOMAS.

**T**HIS was an appeal from the decision of Vice-Chancellor *Wood* upon the construction of the following will:—

"I, *Ann Thomas*, do give and bequeath to my brother *John Thomas* the whole of my money for his life, at his death to be divided between my two nieces *Rebecca* and *Mary Lowe*, my clothes to be divided likewise between them, my watch and trinkets for my niece *Mary Lowe*. I likewise declare that the longest survivor of the above-mentioned nieces is to become possessor of the whole money.

"*Ann Thomas*, September 17th 1833."

The testatrix's property consisted of 860*l.* Bank 3¼ per Cent. Annuities standing in her own name; a moiety of the sum of 1,937*l.* 17*s.* 8*d.* Old South Sea Annuities standing in the names of the trustees of a will by which it was bequeathed to her; 30*l.* in cash deposited with the testatrix's sister *Mary Lowe*; 2*l.* or 3*l.* cash in the house in which the testatrix resided; her wardrobe, trinkets, a few articles of furniture valued at 24*l.*, and half-a-year's dividend on the above sums of stock which accrued due before she died, but had not been received.

The bill was filed by the sisters, and the question was whether the stock passed, which was disputed by the other next of kin.

The Vice-Chancellor decided this question in the negative, and the Plaintiffs appealed.

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Under the following bequest, "to my brother, *J. T.*, the whole of my money for his life, at his death to be divided between my two nieces, *Rebecca* and *Mary L.*, my clothes to be likewise divided between them, my watch and trinkets for my niece, *Mary L.* I likewise declare the longest survivor of the above-mentioned nieces is to become possessor of the whole money:" — *Held*, that stock did not pass.

The


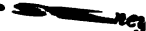







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The case is reported below in Mr. *Kay's Reports* (a) ,

Mr. *Rolt* and Mr. *Hardy*, for the Appellants.

They cited *The Case of Mary Shelmer's Will* (b)  b)  
*Lynn v. Kerridge* (c); *Hotham v. Sutton* (d); *Ommann*  *neg*  
v. *Butcher* (e); *Legge v. Asgill* (f); *Kendall v. K*  *en*  
dall (g); *Gosden v. Dotterill* (h); *Rogers v. Thomas* (i)  (i);  
*Dowson v. Gaskoin* (k); *Cunningham v. Murray* (l)  (l);  
*Willis v. Plaskett* (m); *Glendening v. Glendening* (n)  (n);  
*Boys v. Morgan* (o); *Waite v. Combes* (p); *Vaisey*  v.  
*Reynolds* (q).

Mr. *Walker* and Mr. *C. Hall*, for the next of  in,  
cited *Boys v. Morgan* (o); *Parker v. Marchant* (r).

Mr. *Chandless*, Mr. *Mackeson* and Mr. *Fischer*  *CP*  
peared for other parties.

Mr. *Rolt*, in reply.

*The LORD JUSTICE KNIGHT BRUCE.*

"Non aliter a significatione verborum recedi oportet,  
quàm cum manifestum est aliud sensisse testatorem (s)."  
So said *Marcellus*, and the Vice-Chancellor's conclusion  
appears to be the just result of an accurate application

of

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| (a) Page 369.                       | (k) 2 <i>Keen</i> , 14.                 |
| (b) <i>Gilbert</i> , 200.           | (l) 1 <i>De G. &amp; Sm.</i> 366.       |
| (c) <i>West's Rep. temp. Hardw.</i> | (m) 4 <i>Beav.</i> 208.                 |
| 172.                                | (n) 9 <i>Beav.</i> 324.                 |
| (d) 15 <i>Ves.</i> 319.             | (o) 3 <i>Myl. &amp; Cr.</i> 661.        |
| (e) <i>T. &amp; R.</i> 260.         | (p) 5 <i>De G. &amp; Sm.</i> 676.       |
| (f) <i>T. &amp; R.</i> 265, n.      | (q) 5 <i>Russ.</i> 12.                  |
| (g) 4 <i>Russ.</i> 360.             | (r) 1 <i>Ph.</i> 356.                   |
| (h) 1 <i>Myl. &amp; K.</i> 56.      | (s) <i>Dig. lib.</i> 32, tit. 1, s. 69. |
| (i) 2 <i>Keen</i> , 8.              |                                         |

of that rule, there being here a total absence of context to show that the testatrix employed the word "money" otherwise than in its correct and proper sense, which is not property generally, but a particular species of property. That species no more includes annuities than houses or furniture. An annuity is not, though its fruit is, money, nor where a man gives his wool or his apples are we to presume that he means to give his sheep or his orchard. That this lady herself, if she could be appealed to, would not overrule the judgment which I am now giving I am not clear, but the numerous class of persons who, in wills and otherwise, speak as if the office of language were to conceal their thoughts, have no right to complain of being taken to mean what their language expresses.

*The LORD JUSTICE TURNER.*

It is not unlikely that it was the testatrix's intention to pass by the description "the whole of my money," something more than what strictly and literally speaking would pass under the description of "money," but probability is one thing and judicial certainty another.

Now the first question, as Mr. *Hall* very accurately put, it is this:—Could it be the intention of the testatrix, by those words, to pass the whole of her property? Are they tantamount to a description of the whole of her estate? It appears to me to be clear upon the context of the will that this could not be the intention, because we find in the will, after the disposition of the whole of the testatrix's money, a disposition of some specific articles, namely, her clothes, watch and other things, and this not by way of exception out of the disposition of the whole of her money previously made. It is clear, therefore, that the whole of the residuary estate cannot have been intended to pass under the description of money.

Then

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Then can it be said, that under that description she intended to pass all property producing income? To determine this, we must look at the different sources from which income may be derived. Suppose she had invested her property in a ship instead of the funds? Could it be said that the ship, which is one only of the numerous forms of investment producing income, would pass? I think it clearly would not.

If we deviate from the correct meaning of the words which the testatrix has used, we are immediately involved in the difficulty of deciding how far the deviation is to be carried. I think that in this and in other like cases it is necessary to adhere to the proper and correct sense of the words used in the will, where there is no context to give a different effect to them. The context here relied upon rests entirely on the words "the whole of my money" coupled with the disposition of the residue as "the whole money." But the words "my money" in my mind do not lead to the inference that the testatrix intended anything else than money. The word "whole" may have been introduced for the purpose of including money at her bankers or money deposited with private persons, and she might doubt whether if she said "my money" simply, and not "the whole of my money," the word might not be confined to money in her actual possession.

Then is there anything in the residuary disposition contained in the will which can have the effect of passing more than what was strictly money? It is argued that money must mean money in a state of investment, for a life estate is given, but then it would be by the act of the Court, in order to give effect to the bequest in remainder, that the investment would be made where the same property is given in succession to different persons.

The

The only case amongst those cited, which appeared to give support to such a construction was, that of *Lynn v. Kerridge* (a); but on looking closely at that case, it appears, that there was there a gift of a legacy, which was a charge of course on the general estate of the testatrix, and then an ultimate disposition of "what money was not therein otherwise disposed of." That was held sufficient to explain that the meaning in which the word "money" was used, was not the ordinary meaning of the word.

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I entirely coincide with my learned brother and the Vice-Chancellor.

Appeal dismissed with costs.

(a) *West's Rep. temp. Hardw.* 172.



1854.

May 31.

Before The  
LORDS JUSTICES.

A written authority, signed by a creditor, directed to his debtor and delivered to A. B. in this form : — " I hereby authorize you to pay A. B. the sum of £ —, being the amount of my contract, he having advanced me that sum," is a good assignment, if stamped as such, without being stamped as an order for payment.

## DIPLOCK v. HAMMOND.

THIS was an appeal from the decision of Chancellor *Stuart*, holding that the following document, which was stamped as an assignment admissible in evidence as such without being stamped as an order for payment of money (a):—

"To the Governors and Guardians of St. . .  
*Newington, Walworth, February 1st, 18*

"Gentlemen,

"I hereby authorize you to pay to Mr. *Diplock*, of the *Walworth Road*, the sum of being the amount of my contract at the new work at *Walworth Villa*, Mr. *Diplock* having advanced me sum.

"I remain, Gentlemen,

"Your obedient servant,

"*George Hammond*

It appeared that the document was delivered to the creditor to the assignee of the debt.

(a) 55 *Geo. 3*, c. 184, Schedule, Part I., "Inland Bill." The following instruments shall be deemed and taken to be inland bills, drafts or orders for the payment of money within the intent and meaning of this schedule, viz.: "all bills, drafts or orders for the payment of any sum of money

out of any particular fund may or may not be available upon any condition or contingency which may or may be performed or happen if the shall be made payable bearer or to order, or if the shall be delivered to the person or some person on his or her behalf

The case is reported in the second volume of Messrs. *Smale and Giffard's Reports* (a).

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Mr. *Craig* and Mr. *Welford*, in support of the Appeal.

When the authority is not sent to the debtor, but is delivered to the assignee, it is an order for payment out of a specific fund, and must be so stamped at the time. It cannot be stamped afterwards; 31 *Geo. 3*, c. 25, s. 19 [*The LORD JUSTICE KNIGHT BRUCE*. The words are, "I hereby authorize you to pay" (b)]. That is in effect an order to pay, *Ruff v. Webb* (c); *Hutchinson v. Heyworth* (d); *Lucas v. Jones* (e).

They also referred to *Lord Braybrooke v. Meredith* (f); *Green v. Davies* (g); *Butts v. Swann* (h); *Parsons v. Middleton* (i); *Emly v. Collins* (k); *Fairbank v. Bell* (l); *Jones v. Simpson* (m); *Lestrangle v. Lestrangle* (n); *Jenny v. Herle* (o); *Haydock v. Lynch* (p).

[*The LORD JUSTICE KNIGHT BRUCE* referred to *Evans v. Prothero* (q).]

Mr. *Malins*, Mr. *J. H. Palmer* and Mr. *Speed* appeared for the Respondents, but were not called upon.

*The LORD JUSTICE KNIGHT BRUCE.*

The governors and guardians of the poor of *Saint Mary*,

- |                                                               |                                                 |
|---------------------------------------------------------------|-------------------------------------------------|
| (a) Page 141.                                                 | (i) 6 <i>Hare</i> , 261.                        |
| (b) See <i>Russell v. Powell</i> , 14 <i>M. &amp; W.</i> 418. | (k) 6 <i>Mau. &amp; Sel.</i> 144.               |
| (c) 1 <i>Exp.</i> 129.                                        | (l) 1 <i>B. &amp; A.</i> 36.                    |
| (d) 9 <i>A. &amp; E.</i> 375.                                 | (m) 2 <i>B. &amp; C.</i> 318.                   |
| (e) 5 <i>Q. B.</i> 949.                                       | (n) 13 <i>Beav.</i> 281.                        |
| (f) 13 <i>Sim.</i> 271.                                       | (o) 2 <i>Ld. Raym.</i> 1361; 1 <i>Str.</i> 591. |
| (g) 4 <i>B. &amp; C.</i> 235.                                 | (p) 2 <i>Ld. Raym.</i> 1563.                    |
| (h) 2 <i>Bro. &amp; B.</i> 78.                                | (q) 1 <i>De G. Mac. &amp; G.</i> 572.           |

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*Mary, Newington*, owed Mr. *Hammond* a debt, who the Plaintiff Mr. *Diplock* asserts that *Hammond* assign to him for value. The Plaintiff asserts that this was assignment, giving him a preferable lien to that of the Defendant Mr. *Booth*, who claims under another assignment of the same debt made by the same creditor *Booth*. Now, of the truth of the whole of this position there can, independently of the provisions of the Stamp Law, be no doubt or reasonable question; for *Hammond* signed this paper [His LORDSHIP read the document aloud and set out]. This document was served upon the debtor. With regard to *Booth's* claim, the assignment to him was not only executed subsequently to the equitable assignment to *Diplock*, but was not served upon the debtors after the service upon them of *Hammond's* assignment. The cause therefore would be in effect undefended if the Stamp Law were out of the question. It is said, however, that by reason of those laws, the Plaintiff's case wholly fails; and the argument is put thus, that the Stamp Laws either render what would otherwise be an assignment not an assignment, or that on certain assignments a double stamp is required. If the law of this country is in such a singular state, it must be submitted to until it shall be altered, but I have the satisfaction of thinking that the law is not in so discreditable a condition.

The first contention is hardly arguable, that the Stamp Laws prevent that from being an assignment which would have been one independently of those laws. With respect to the other proposition, that the language of the document is such as (though not essential to the nature of the document as an assignment) to require a double stamp (one as an order for payment of money, and another as an assignment), it is admitted that if it had begun thus, "hereby assign," there would be no question but that a assignment stamp would have been sufficient. It is  
 however

however, contended that this change of words makes a great difference and turns the document into an order, requiring to be stamped accordingly, and that as it cannot now be so stamped the document is not admissible. I am of opinion that such a construction of the stamp laws is unnecessary, and would be harsh, oppressive and irrational. The document may or may not be in some sense an order for payment of money, but it is not the less an assignment requiring such a stamp only as has been affixed.

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It appears to me that the point is perfectly clear, and that the Appeal ought to be dismissed with costs.

*The LORD JUSTICE TURNER.*

As the Lord Justice agrees with the Vice-Chancellor, it is not necessary for me to express any opinion of my own, but I see no reason why the document should not operate as an assignment when stamped as an assignment.

Appeal dismissed with costs.





1855.

THE INCORPORATED CHURCH BUILDING  
SOCIETY v. COLES.

May 2.

Before The  
Lord Chan-  
cellor, LORD  
CRANWORTH.

A testator, by his will, executed three calendar months before his death, devised two houses in *Brighton* to trustees, upon trust to sell and invest the purchase-money, and to pay the dividends to his wife during her life, and at her death to make over and transfer the principal sum so invested to the treasurer for the time being of the Incorporated Society for Promoting the Enlargement, Building and

Repairing of Churches and Chapels, to be applied to the uses and purposes of that society:—*Held*, that such a gift was not within the scope of the Act 43 *Geo.* 3, c. 108, and could not be sustained either in its entirety or as a gift of the proceeds of the sale to the extent of 500*l.*, but was void under the Act 9 *Geo.* 2, c. 36.

The Act 43 *Geo.* 3, c. 108, was passed with a view of authorizing limited dispositions of land by deed or will in favour of the charitable uses therein specified, but the intent of the legislature was, that the gift should be of specific lands for one or other of the specific purposes indicated in that act, and therefore a gift of the proceeds of land is not within the protection of that act, but is obnoxious to the provisions of the Statute of Mortmain, 9 *Geo.* 2, c. 36.

**R**OBERT JAMES HARRISON, by his will dated *February* 1838, gave to his wife *Lucy Harrison*, *Neville Read*, and *Michael Hinton Castle* and the survivor, and the heirs and assigns of such survivor, his two freehold houses in *Sillwood Place, Brighton*, upon trust to sell and invest the purchase-money in government securities or public funds of *Great Britain*, and to pay the dividends arising therefrom half-yearly to his wife for her sole use and benefit during her life, and at her death to make over and transfer the principal sum so invested in government securities or the public funds of *Great Britain* to the treasurer for the time being of the Incorporated Society for Promoting the Enlargement, Building and Repairing of Churches and Chapels, to be applied to the uses and purposes of that society.

The testator lived more than three calendar months after the execution of his will, and died leaving two sisters, *Harriet* the wife of the Defendant *Cator*, and *Elizabeth Harrison*, his coheirresses at law. *Elizabeth Harrison* died leaving the Defendant *Wilson* her heir-at-law.

at-law. The testator's widow, who afterwards married the Defendant the Rev. *John Coles*, was the survivor of the three trustees named in the will.

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The Plaintiffs in this suit were the Incorporated Society for Promoting the Enlargement, Building and Repairing of Churches and Chapels, and were incorporated by the Act 9 *Geo.* 4, c. 42. The bill was filed by them against the Rev. *John Coles* and *Lucy* his wife, and Mr. and Mrs. *Cator* and Mr. *Wilson*. The bill submitted that the trusts for the benefit of the Plaintiffs were not void by virtue of the Act 9 *Geo.* 2, c. 36; but valid; and in particular that by virtue of the Act 43 *Geo.* 3, c. 108, the testator was authorized to devise the houses and premises in the manner mentioned and the Plaintiffs to receive the benefit of the same; and that if, in consequence of the form of the devise and of the trusts thereof, the gift for the benefit of the Plaintiffs was to be considered as a gift of goods and chattels and not of lands and tenements, yet the Plaintiffs were entitled to the benefit thereof to the value of £500 at the least; and praying that the rights of all parties under the devise might be declared and the trusts carried into effect; that the houses might be sold, and the purchase-money invested and secured for the benefit of all the parties interested. The Vice-Chancellor *Wood* dismissed the bill, holding that the devise was void as not being within the scope of the Act 43 *Geo.* 3, c. 108, and that it could not under that Act be sustained either in its entirety or as gift of the proceeds of the sale to the extent of £500 (a). From that decree the Plaintiffs now appealed to the Lord Chancellor.

The following sections of the Act 43 *Geo.* 3, c. 108, were

(a) 1 *Kay & John*. 145.

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were relied upon by the Appellants and observed up by the Lord Chancellor.

Sect. 1. Whereas a sufficient number of churches and chapels for the celebration of divine service according to the rites and ceremonies of the United Church of *England* and *Ireland*, and of mansion-houses with competent glebes for the residence of ministers officiating in such churches and chapels, is necessary towards the promotion of religion and morality: And whereas the same are either wholly wanting or materially deficient in most parts of *England* and *Ireland*: And whereas many well-disposed persons would be desirous of contributing towards the supply of such defects if they were enabled so to do in the manner hereinafter directed; May it therefore please your Majesty that it may be enacted, and be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons in this present Parliament assembled, and by the authority of the same, that all and every person and persons having in his or their own right any estate or interest in possession, reversion or contingency of or in any lands or tenements, or of any property of or in any goods or chattels, shall have full power, licence and authority at his and their will and pleasure by deed enrolled in such manner and within such time as is directed in *England* by the statute made in the twentieth seventh year of the reign of King *Henry* the Eighth and in *Ireland*, by the statute made in the tenth year of the reign of King *Charles* the First for enrolment of bargains and sales, or by his, her or their last will or testament in writing duly executed according to law, or by deed or such will or testament being duly executed within twelve calendar months at least before the death of such grantor or testator including the days of the execution and death to give and grant to and vest in any person or persons

bc

body politic or corporate, and their heirs and successors respectively, all such his, her or their estate, interest or property in such lands or tenements not exceeding five acres, or goods and chattels or any part or parts thereof, not exceeding in value five hundred pounds, for or towards the erecting, rebuilding, repairing, purchasing or providing any church or chapel where the liturgy and rites of the said united church are or shall be used or observed, or any mansion-house for the residence of any minister of the said united church, officiating or to officiate in any such church or chapel, or of any outbuildings offices churchyard or glebe for the same respectively, and to be for those purposes applied according to the will of the said benefactor in and by such deed enrolled, or by such will or testament executed as aforesaid expressed, the consent and approbation of the ordinary being first obtained, and in default of such direction, limitation or appointment in such manner as shall be directed and appointed by the patron and ordinary, with the consent and approbation of the parson, vicar or other incumbent, and such person and persons, bodies politic and corporate, and their heirs and successors respectively, shall have full capacity and ability to purchase receive take hold and enjoy for the purposes aforesaid, as well from such persons as shall be so charitably disposed to give the same as from all other persons as shall be willing to sell or aliene to such person or persons bodies politic or corporate, any lands or tenements goods or chattels without any licence or writ of ad quod damnum, the Statute of Mortmain, or any other statute or law to the contrary notwithstanding: provided always, that this Act, or anything therein contained, shall not extend to enable any person or persons being within age or of nonsane memory, nor women covert without their husbands, to make any such gift grant or alienation; anything in this Act contained to the contrary in anywise notwithstanding.

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Sect. 2. Provided also, and it is hereby further enacted, that no more than one such gift or devise shall be made by any one person, and that if any such gift or devise as aforesaid shall happen to exceed five acres in lands or tenements, or the value of five hundred pounds in goods and chattels, every such gift or devise shall be good and valid to the extent aforesaid; and it shall be lawful for the Lord Chancellor for the time being on petition to make order for reducing every such gift or devise to and within the said limits, and for allotting such specific five acres, and if occasion should require such specific goods and chattels as in his judgment shall be most convenient, and to make such further order touching the premises as to him shall appear just and reasonable.

Sect. 3. Provided also, that no glebe containing upwards of fifty acres shall be augmented with more than one acre under or by virtue of this Act, but that the excess, if any, given or devised for the purpose of such augmentation, shall be reduced in manner aforesaid by the said Lord Chancellor, and such order thereupon shall be by him made as hereinbefore is directed in the case of an excess beyond five acres.

Mr. *Rolt* and Mr. *Kenyon*, for the Plaintiffs the Appellants.

We submit first, that the devise to the Plaintiffs is clearly of land within the saving of the Act 43 *Geo. 3*, c. 108, the 1st sect. of that Act in terms legalizing such a devise for the purpose of erecting, rebuilding, repairing, purchasing or providing, any "church or chapel," &c.; the Vice-Chancellor however has held, that the word land in that section is referable only to the 1st and 5th of the purposes there indicated, and that goods and chattels are referable to the three intermediate purposes, but all the purposes are equally attainable by the application of land  
 or

or its proceeds, or of goods and chattels. In the present case the testator has not given land to the extent which he might have given it. The value of the land, or the accident of its being covered with houses, can be no criterion as to whether the devise is or not within the Act, for land fluctuates in value and the poorest land may eventually prove the most valuable either by its increased proximity to a town or the discovery of minerals. It was held by the Vice-Chancellor that, by the power conferred upon a testator by the Act 43 Geo. 3, c. 108, to pass all such his estate, interest or property in land, the legislature intended that a testator should only be permitted to devise all his estate without reserve, and that it is not competent for him to give an estate in remainder. It is submitted, however, that such a construction is most arbitrary and unreasonable. Secondly, inasmuch as the Act 43 Geo. 3, c. 108, limits the powers of devising and bequeathing to five acres or goods and chattels not exceeding 500*l.* in value, we submit that the purposes of that Act are satisfied by the trustees accepting the devise as land; what they may ultimately do with the proceeds is wholly immaterial, there being no necessity for the enjoyment of the land in specie or in a particular parish. Thirdly, if the devise must be enjoyed in specie and used in one of the ways indicated by the Act 43 Geo. 3, c. 108, there is nothing to show that it may not now be used in one or other of the prescribed modes. Fourthly, assuming this not to be a devise of land but a bequest only of its proceeds to the Plaintiffs, still we submit that they are at least entitled to the benefit of the bequest to the extent of 500*l.* under the discretionary powers conferred upon the Lord Chancellor by the 2nd section.

Mr. Headlam, Mr. Rogers, Mr. Smythe and Mr. Pownall, appeared for the several Defendants, but were not called upon.

*The*

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*The* LORD CHANCELLOR.

I have not a doubt upon this case; the Act 43 *Geo.* 3, c. 108, authorizes any person, by his will executed three calendar months before his death, to give to any person or body politic all his estate interest or property, in lands or tenements not exceeding five acres, or goods and chattels or any part or parts thereof not exceeding 500*l.* in value for the purposes therein specified.

In this case the testator, having two houses in *Brighton*, gave them to trustees upon trust to sell and invest the proceeds in government securities and to pay the dividends to his widow for her life, and after her death to transfer the principal monies to the Plaintiffs. There is no doubt but that under the Statute of Mortmain such a gift would be void, and the question is, whether it is made valid by the operation of the Act 43 *Geo.* 3, c. 108. The property is confessedly under five acres, and it has been contended that as such it is a gift authorized by the Act. But I do not think so; the construction which the Vice-Chancellor arrived at, and in which I concur, is, that these five acres or any less amount are to be specifically enjoyed for one or other of the specific purposes indicated by the Act. Any other construction would be absurd; in the first place, there being no limit to the value of land, according to the Appellants' construction, while the Act limits the value of goods and chattels to be bequeathed to 500*l.*, a land to the value of 50,000*l.* might be devised to be converted into money.

It is true that, under the Act, land in the vicinity of *Belgrave Square* might be given to the minister of the parish with certain restrictions, as that if there was a glebe of more than fifty acres the augmentation could only be to the extent of one acre; but the whole in—

tent of the legislature, as discoverable from every section of the Act, was directed and evidently points to a specific gift for a specific purpose. The 2nd section, which was relied upon as justifying another interpretation, confirms this construction; for if any other was put upon it, a testator might give five acres in the neighbourhood of *Belgrave Square* and five acres of worthless land in *Wales*, and it would be the duty of the Lord Chancellor to determine which five acres were legally devised. It would be absurd that this Court should in such cases have the obligation imposed on it to select the land, yet this is the construction which must be adopted to support the Appellants' contention. It seems to me, therefore, that the legislature meant, that land not exceeding five specific acres might be dedicated to one or other of the specific purposes mentioned in the Act. The Appellants say, that they ought at all events to have to the extent of 500*l.* in value; but it seems to me that the construction which I have put upon the statute disposes also of that question, for the gift is clearly not a specific gift of land but of the proceeds of the sale of land which is not authorized by the Act; thus the gift would be obnoxious to the provisions of the Statute of Mortmain which applies as well to the proceeds of land as to the land itself. I think the Vice-Chancellor is right; and this Appeal must be dismissed with costs.

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1855.

## THE QUEEN v. HANCOCK.

June 2.

Before The  
Lord Chan-  
cellor, LORD  
CRANWORTH.

A writ of scire  
facias having  
issued out of  
Chancery to  
repeal certain  
letters-patent,  
the patentee  
presented a  
petition to the  
Common Law  
side of the  
Court, alleging  
that the writ  
contained im-  
proper recitals  
and sugges-  
tions, which, if  
used as a de-  
fence in an  
action at law  
for the in-  
fringement of  
a patent,  
would be in-  
admissible, and  
praying that  
the writ might  
be quashed or  
reformed by  
striking out  
the objection-  
able matter,  
the Lord Chan-  
cellor declined  
to exercise the  
jurisdiction re-  
served to him  
by the 46th  
section of the

Act 12 & 13 Vict. c. 109, on the ground that by the 39th section of that Act juris-  
diction in such cases was conferred on the judges of the Superior Courts of Common  
Law, and that they could more satisfactorily dispose of the question of pleading in-  
volved in the case.

THIS was the petition of *Thomas Hancock, Thomas H. Birley, Herbert Birley and Hugh Birley*, partners in certain letters-patent which, on the 27th November 1843, had been granted to the Petitioner *T. Hancock*, for certain improvements in the manufacture of caoutchouc.

The petition stated that the specification had been duly enrolled on the 21st May 1844, that divers actions had been brought by the Petitioner, *T. Hancock*, against persons who had infringed the patent, and that a verdict was found for the Plaintiff in all the issues, which verdict had never been disturbed; that, on the 8th May 1855, a writ of scire facias was issued out of Chancery, directed to the sheriff of *Middlesex*, on the application of *Lockington St. Lawrence Bunn*, for the purpose of procuring the said letters-patent to be revoked and annulled; that the writ was framed in an unusual and improper manner, both as regards the recitals and suggestions therein contained; and among others contained a recital that, before the Solicitor-General had made his report, the Petitioner *T. Hancock* had caused a certain paper writing, describing his invention, to be deposited with the Solicitor-General, and which paper writing was entitled, "Heads of Mr. *Thomas Hancock's* invention;" that the writ also contained a suggestion that the Petitioner *T. Hancock* did,

*did*, in and by his specification, claim a third part of the *invention* therein described, which was not described in *the* deposit paper. The petition then stated that the *Petitioners* attended the Attorney-General on 3rd *May* 1855, in order to offer reasons against the grant of his *fiat*, and insisted that the above recital and suggestion ought not to be embodied in the writ; but that, notwithstanding such objections, the writ had issued and was returnable in Chancery on the 24th *May* 1855, and that by the practice of the Petty Bag, upon the writ being returned, the prosecutor would be entitled to enter a rule to recover, and unless the *Petitioners* appeared to the writ within eight days after the entry of the rule, judgment on the *scire facias* might be signed against them by default.

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v.  
HANCOCK.

The petition further stated that the recital and suggestion were calculated seriously to prejudice and embarrass the *Petitioners* in their defence, and did not raise any matter which a person infringing the patent would be entitled to plead in defence to an action for an infringement.

The petition then stated that the *Petitioner T. Hancock* had brought actions in the Courts of Queen's Bench and Exchequer against persons who had infringed the patent, and that the *Defendants* in each of such actions had pleaded pleas which were substantially the same as the recitals and suggestions in the writ, but such pleas were ordered by the Court to be struck out after argument, the *Defendants* being at liberty to plead non concessit in lieu thereof, and a plea alleging in substance that the *Plaintiffs* in the actions did not specify the invention for which the patent was granted, but specified a different invention. The petition prayed that the writ might be quashed, or superseded, or reformed and altered, by striking out therefrom so much of the recitals as related to the deposit paper,

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paper, and to the suggestion, and that in the meantime, and until the writ should have been reformed, all proceedings under the same might be stayed.

The following Sections of the Act 12 & 13 Vict. c. 109, were discussed in the argument and observed upon by the Lord Chancellor.

Sect. 39. And be it enacted, that in every action, suit, and proceeding now pending or which at any time hereafter shall be commenced or pending in the said Court of Chancery, on the Common Law side thereof, it shall be lawful for the superior Courts of Common Law, and the judges thereof respectively, and they are hereby respectively required, to hear and determine all such matters or applications arising in or incident to any such action, suit, or proceeding as aforesaid, as before the passing of this Act might have been heard and determined by the Lord Chancellor and the Master of the Rolls, or either of them, and also to transact, do, and perform all such business matters and things in, about, touching or concerning any action, suit, or proceeding on the Common Law side of the said Court of Chancery, as by virtue of any orders or regulations for the time being in force by virtue of this Act may be transacted, done, or performed by such judges subject, nevertheless, and according to the provisions of this Act, and the laws, rules, and regulations for the time being in force for the regulation of the said Court, and the practice and proceedings thereof.

Sect. 46. And be it enacted, that nothing in this Act expressed or contained shall take away, or in anywise diminish or prejudice the jurisdiction or any of the powers, rights, or privileges of the Lord Chancellor, as judge of the said Court of Chancery, or otherwise howsoever, or the jurisdiction, or any of the powers, rights, or privileges

the Master of the Rolls, as the Keeper of the records of the said Court, or as a Master or Judge of the said Court, or otherwise.

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Mr. Webster, Mr. J. B. Karslake, and Mr. E. K. Karslake, in support of the Petition.

We submit that no such writ ought to have issued. The suggestions which appear on the writ, are in substance the same as the matter disallowed to be pleaded in defence to the action brought by the Petitioners, for the infringement of their patent, on the ground that it amounted to a pleading of evidence; *Hancock v. Noyes (a)*, *Hancock v. Smith* (not reported). And the Plaintiff here is in an analogous position to that of a Defendant in an action for an infringement. The scire facias can only be founded on some matter of record, and the letters-patent here contain the only matter of record upon which any suggestion can be made. It is quite clear that the deposit paper, which was for the first time only required during the tenure of office of Attorney-General by Sir J. Romilly, was never intended to be conclusive on the inventor, else why should he be allowed an interval of six months to file his specification, in which the inventor is bound to state the true ground of his invention, and to specify all improvements up to that time, *Crossley v. Beverly (b)*.

They also referred to *Baddeley v. Denton (c)*; *The Queen v. The Eastern Archipelago Company (d)*; *Garrard v. Buck (e)*; *Hindmarch on Patents*, p. 389.

It will be argued that by the 39th sect. of the Act 12 & 13 Vict. c. 109, the Common Law Courts have the jurisdiction in such cases transferred to them, but that is only

(a) 9 Exch. 388.

Exch. 44.

(b) 3 Car. & P. 513.

(d) 1 E. & B. 310.

(c) 19 Law Journ. (N. S.)

(e) 8 C. B. 231.

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only applicable to pending actions, which is not the case here, and by the 46th sect. of that Act, the jurisdiction of the Court of Chancery is expressly preserved.

Mr. *Rolt*, Mr. *Hindmarch* and Mr. *Macrory*, contra.

It is the province of the Attorney-General to ascertain whether the writ should issue, and this Court will never interfere, except on good and substantial grounds, as in cases of abuse of the writ, *Reg. v. Neilson (a)*. We submit, however, that the jurisdiction of the Common Law side of the Court of Chancery is, by the 39th sect. of the Act 12 & 13 Vict. transferred to the Courts of Common Law, and the Judges thereof are "required to hear and determine all such matters."

There is no analogy between striking out matter in a declaration and in a plea. Besides the Petitioners might have demurred specially. [The LORD CHANCELLOR referred to the 51st and 52nd sects. of the Common Law Procedure Act, 15 & 16 Vict. c. 76, and observed, that although special demurrers might be taken away by the Act, yet that where pleadings were framed to embarrass the exceptionable matter might be struck out upon proper application to the Court or a Judge.] We submit, that if the Petitioners are right as to their view of the writ in a Court of Common Law, that they ought to try the question there; the writ however is a matter of right, *Sir O. Butler's Case (b)*.

Mr. *Webster*, in reply.

*The LORD CHANCELLOR.*

This Court is one both of Law and Equity, though the business transacted here is practically and almost exclusively

(a) *Webb. Pat. Ca.* 668. See p. 672.

(b) 2 Vent. 344.

clusively confined to that of a Court of Equity as distinguished from a Court of Law. There still remains, however, its legal jurisdiction, but in the exercise of that jurisdiction difficulties often arise relating to points of pleading, with which this Court is not so familiar as the Courts of Common Law, and in order to meet these very difficulties the Act 12 & 13 *Vict.* c. 109 (The Petty Bag Office and Inrolment in Chancery Amendment Act), was passed. By the 39th sect. of that Act, it is enacted—[His Lordship here read the section.] It was said, that no action was commenced, so as to give a Court of Common Law jurisdiction within the meaning of the 39th section, but it appears to me that the issuing of the writ of scire facias was a proceeding, to all intents and purposes, within that section, and that a Court of Common Law has jurisdiction now to make any order or determine any matter or application incident to or arising out of this action which I am asked to do, or that this Court could have done, before the passing of this Act, or which, probably under the 46th section, it might still do. Under these circumstances, the question is what ought I to do?

It appears to me, that the present is an application which ought not to have been made to me, but to one of the Superior Courts of Law, because they are more competent to decide on a point of pleading, and, being more familiar with such matters, would deal with the question more satisfactorily than this Court could possibly do. In all probability, if I had to decide the question of pleading involved in this case, I should call in the assistance of one of the Common Law Judges.

His Lordship observed upon the delay of the Petitioners, after they must have been aware of the Attorney-General's sanction to the issuing of the writ, and added, that it was quite obvious the object of the Act 12 & 13

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*Vict. c. 109*, was to transfer the jurisdiction, in cases like the present, from this Court to the Court of Common Law.

Mr. *Rolt* asked for the costs of the application.

The LORD CHANCELLOR.

I will give you the costs, unless the Petitioners will undertake to pay them in the event of the success of your client, the prosecutor in the writ.

This was agreed to by the Petitioners.

NOTE.—A verdict was found for the Petitioners (the Defendants in the action) on the 9th July 1855.

#### BATE v. HOOPER.

July 18, 25.

Before The  
 Lord Chan-  
 cellor, LORD  
 CRANWORTH.

A testator gave the residue of his estate to trustees, who were also his executors, desiring them, immediately after

his decease, to convert all his personal estate into money, and to invest the amount "in the Bank of England," and to permit his daughter to receive the rents and profits, dividends or "other annual produce" of his personal estate for her life, for her own use, and after her death the property was to go to her children equally. The testator died in 1825, possessed of, among other things, 24*l.* Long Annuities, which the executors did not convert, but permitted the tenant for life to enjoy in specie. On the death of the survivor of the executors, his executors also neglected to convert the Long Annuities. The tenant for life had represented, both to the original executors and to the executors of the survivor, the propriety of a conversion. She had mortgaged her interest, and two of the children had mortgaged their shares in the residue. Upon bill filed by all the children against the executors of the surviving executor and their mother,—*Held*, that the non-conversion was a breach of trust, and that the executors must account for the difference between the value of the Long Annuities at the end of one year from the date of the testator's death, and their value when paid into Court; that the tenant for life was not liable to refund the over-payments voluntarily made to her, and that the facts disclosed no case of acquiescence either on the part of the tenant for life or those in remainder.

of the will of the testator. The testator by his will, bearing date the 20th September 1822, so far as it is material to be stated, gave and bequeathed all the residue of his estate unto *John Gibbins* and *John Barker*, their heirs, executors or administrators, or the survivor of them, upon trust, immediately after his decease to convert all his personal estate into money, and to invest the amount "in the Bank of *England*" in their joint names, and to permit his daughter *Eliza* to receive the rents and profits of his real estate, and also all the rents and profits, dividends or other annual produce of his personal estate for her life for her own use, and after her decease he gave and devised the said residue to the children of his daughter equally as tenants in common.

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The testator died in *July* 1825, and his will was duly proved by his executors, *J. Gibbins* and *J. Barker*. *J. Barker* died in *November* 1838, and letters of administration to him were granted to the Defendant *Augustus Clayton Bate*. On the 30th September 1843, *J. Gibbins* died, having appointed the Defendants *J. H. Hooper* and *J. Morsey* his executors, who proved his will.

The bill was filed on the 10th November 1848, by the Plaintiffs against *J. H. Hooper*, *J. Morsey* and *Eliza Bate*, the mother of the Plaintiffs, and *A. C. Bate* and *J. Martin*, who was an incumbrancer upon the share of *Eliza Bate*, and after stating that *J. Gibbins* and *J. Barker* had not converted the Long Annuities, prayed for a declaration that the non-conversion of the Long Annuities was a breach of trust, that *J. Barker* and *J. Gibbins*, and their respective estates, were jointly and severally liable to make good the loss they occasioned to the persons entitled to the residuary estate of the testator after the decease of *Eliza Bate*, to the extent to which such loss was occasioned during their

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respective lives, and that *J. H. Hooper* and *J. Mossey* were liable personally to make good the loss to the extent to which it had been occasioned, since the decease of *J. Gibbins*, and that they might be removed from being trustees, and that new trustees might be appointed.

When the cause came on to be heard before the Vice-Chancellor *Knight Bruce* on the 26th April 1849, it was, among other things, referred to the Master to inquire and state in what manner, and under what circumstances, the payment of the 24*l.* Long Annuities had been paid or applied by the executors of the testator, or either of them in their respective lifetimes, or by their legal persons representatives, since the death of the testator, with liberty to state special circumstances, and it was ordered that the Long Annuities as and when received should be laid out in Consols in trust in the cause, subject to the further order of the Court.

The Master, by his general report, bearing date the 3<sup>d</sup> May 1854, among other things found that *J. Gibbins* and *J. Barker* did not convert the Long Annuities, that *Eliza Bate* had received them in specie till the death of *J. Gibbins*, that she had on several occasions applied to *J. Gibbins* to convert the Long Annuities into Consols and that when she first applied to *J. Gibbins* he had told her it could not be done; and afterwards, on a subsequent occasion, admitted that it might be done, but said, "You can't afford it; at some future time, perhaps, it may be done." The Master also found that twelve months after the death of *J. Gibbins*, *Eliza Bate* had requested *J. H. Hooper* to convert the Long Annuities, but that he had declined, alleging as a reason that *J. Gibbins* ought himself to have done it. The Master also found that *Eliza Bate* had received the Long Annuities from 1825 down to April 1847, and that she had applied the same in her maintenance, education and bringing up of her children.

Whe

When the cause came on to be heard upon further directions before the Vice-Chancellor *Stuart*, his Honor declared that there had been no breach of trust, and that all parties were entitled to their costs out of the fund as between solicitor and client. From that declaration the Plaintiffs now appealed to the Lord Chancellor.

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Mr. *Wigram* and Mr. *J. H. Terrell*, for the Plaintiffs, in support of the appeal.

We submit that the direction in the will to convert was obligatory on the executors, and that the non-conversion was a breach of trust, and that they and their representatives ought to have been made liable, not only for the omission to convert, but for the costs of the suit, which has been occasioned by their negligence.

They cited and commented upon the following authorities: *Howe v. Earl Dartmouth* (a); *Pickering v. Pickering* (b); *Caldecott v. Caldecott* (c); *Lichfield v. Baker* (d).

Mr. *Beavan* appeared for the Defendant *Martin*, an incumbrancer.

Mr. *A. H. Welch* and Mr. *E. N. Ayrton*, for other parties.

Mr. *Bacon* and Mr. *Steere*, for the executors of the executor, *John Gibbins*, in support of the Vice-Chancellor's decree.

The authority of *Howe v. Earl Dartmouth* (e), as to the necessity for conversion, has not been implicitly followed, for wherever this Court can it does lay hold of slight indications of intention in favour of an enjoyment in specie, *Hinves v. Hinves* (f), where Sir *James Wigram* states

(a) 7 *Ves.* 137 a.

(d) 13 *Beav.* 447.

(b) 4 *M. & C.* 289.

(e) 7 *Ves.* 137.

(c) 1 *Y. & C. C. C.* 312.

(f) 3 *Hare*, 609. See p. 611.

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states his opinion to be, that in the more modern cases the Court, in applying the rule, has leant against conversion as strongly as is consistent with the supposition that the rule itself is well founded; and the observations of the same learned judge in the case of *Mackie v. Mackie* (a) are to the same effect:—He there says, “In modern cases circumstances apparently trifling have been held sufficient to entitle a tenant for life to the enjoyment of the specie of the residue for his life.”

We submit that the words directing the trustees to convert into money the testator's personal estate, and invest it in “the Bank of *England*,” did not render it obligatory on the trustees to convert the Long Annuity which they found standing in the Bank of *England* in books, in the name of the testator at his death; and the gift in terms of the “other annual produce,” is sufficient to show that an entire conversion was not intended. [*Vaughan v. Buck* (b).] [The LORD CHANCELLOR. The presumption is, *prima facie*, in favour of an obligation to convert.] At all events we contend, that if a breach of trust has been committed, it has been with the concurrence of Mrs. *Bate* and her children, and that we are at least entitled to have Mrs. *Bate's* life interest impounded to make good the deficiency. We also submit that the liability, if any, of the trustees, ought to have been declared by the original decree, and it is too late to seek to make them liable on further directions.

Mr. *E. F. Smith* for Mrs. *Bate*. The decree as made at the bar, as against Mrs. *Bate*, is not in accordance with the prayer of the bill.

Mr. *Bacon* objected, that inasmuch as Mrs. *Bate* had not appeared she could not be heard; but the Lord Chancellor allowed the argument to proceed, intimating that Mr. *Bacon* might, if he desired, be heard in reply.

(a) 5 *Hare*, 70. See p. 77.

(b) 1 *Phil.* 75.

Mr. E. F. Smith.

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The case of *Lichfield v. Baker* (a), shows that in a suit constituted like the present, a legatee cannot be made to refund overpayments voluntarily made by an executor. Sir Thomas Plumer lays down the principle thus: "It is admitted that at law it is impossible to recover after a voluntary payment with a knowledge of all the facts, though under a mistake in point of law; it cannot be disputed, and though in one of the cases there was a difference of opinion among the judges, yet it is now settled, that where an action is brought, and is proceeding, and the Defendant having a knowledge of all the circumstances, and having the means of proving them at the trial, submits to pay, he has no remedy at law. Then upon what principle can it be said that he is not concluded in equity also? * * * The principle applies equally to suits here," *Goodman v. Sayers* (b). The cases of *Bilbie v. Lumley* (c); *Clifton v. Cockburn* (d); *Currie v. Gould* (e), are all to the same effect.

At most however it is submitted that Mrs. Bate can only be made responsible for the difference between what would have been raised by a sale of the 24*l.* Long Annuities one year after the date of the testator's death and their present value, *Raby v. Ridehalgh* (f).

Mr. J. H. Terrell, in reply.

It was said that there was no declaration, at the original hearing, as to the liability of the trustees; but no declaration could be or ever is made before the preliminary inquiries are answered, and all proper parties found to be before the Court. As to the costs of this suit,

(a) 13 Beav. 447.

(b) 2 J. & W. 249. See p. 263.

(c) 2 East, 469.

(d) 3 M. & K. 76.

(e) 2 Mad. 163.

(f) 1 Jurist (N. S.), 363.

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suit, the trustees, having attempted to uphold a construction of the will which is untenable, must pay the costs of the suit.

The LORD CHANCELLOR.

This is not a case in which any question can arise as to the application of the rule laid down in the case of *Howe v. Earl Dartmouth* (a), because here there is an express direction to convert and invest; but it was said that the clause following the direction to convert, in which the testator desires the trustees to "permit *Eliza Bate* to receive the rents and profits, dividends or other annual produce of the personal estate for her life, for her own use," qualifies the direction to convert, and authorized the trustees to pay to the tenant for life the Long Annuities in specie. That is a far-fetched construction to which I cannot accede. I have no doubt upon the point, as to the obligation to convert, and in that respect therefore, I cannot concur with the expression in the Vice Chancellor's decree, which declares that the non-conversion was not a breach of trust. It was said, however, that assuming it to have been a breach of trust, there had been what amounted to acquiescence on the part of the Plaintiffs and Mrs. *Bate*, but no such case is established. With respect to the Plaintiffs, the children of the testator, it was said that they are estopped from obtaining the relief they pray, because they have assigned their shares with the concurrence of the tenant for life, and the mortgagee has been receiving the Long Annuities, but I think there was no acquiescence in that. So far as the children were concerned, the amount received by the mortgagee was in respect of the life interest of their mother, Mrs. *Bate*, and so far from there having been any acquiescence on the part of Mrs. *Bate*, it is found that she had frequently applied to the executors to have the Long Annuities

(a) 7 Ves. 137.

Annuities converted. What then is the liability of the trustees? It is to make good as much Consols as would have been produced by the sale of the Long Annuities at the end of one year after the testator's death, and as to their value there must be an inquiry. The trustees then are, in the first instance, bound to make good that sum, but then as against that they must have credit for the value of the Long Annuities which they have paid into Court. If it is not clear that there are assets of *J. Gibbin* to meet the difference, then there will be an inquiry on that head, and if there are sufficient assets it is not necessary to consider as to how far the Defendants, *Hooper* and *Morsey*, are liable.

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It was urged that Mrs. *Bate* was liable to make good the amount she has been overpaid, but I cannot adopt that argument, because she was not a willing party to any overpayment; and it would be extremely hard if, after a lapse of thirty years, she should now be called upon to refund the sums which the trustees voluntarily paid her. As to the matter having been disposed of by the first decree, it does not amount to a declaration that the trustees were not responsible; it is not now necessary to inquire whether that decree was worded in the best form, and the more especially as in a question between co-defendants, it is right that the decree should be made on further directions. With respect to the costs, I think the trustees are entitled to all costs, except as to so much of the costs of suit as relates to the breach of trust in the non-conversion of the 24*l.* a year Long Annuities; those costs I cannot give them, but I will not make them pay costs, for it was not a breach of trust by which they were to benefit themselves; and though they were guilty of a breach of trust, I will not visit them with the penal consequences. All other parties will have their costs out of the estate.

1854.

June 5.

Before The
LORDS JUSTICES.

A testator, entitled to freehold estates and to a leasehold for years, determinable on lives, charged by his will an annuity on both rateably, and directed that in the event of his interest in the leasehold expiring before the annuity, the proportion of the annuity charged on the leasehold should thenceforth issue out of a designated freehold estate. Subject to the annuity, he devised and bequeathed the freeholds and leasehold to different persons. The legatee of the leasehold surrendered the lease and took a new one determinable on different lives:—*Held*, that the new lease was not for the purpose of the substitution for the old, but that on the death of the last cestui que vie named rendered lease, the leasehold ceased to be charged with the annuity, and the apportioned to the leasehold became charged on the designated freehold.

KEMPE v. KEMPE.

THIS was an appeal from a decree of the Master of the Rolls, declaring that under the will of *Kempe* an estate called *Beruppa* was liable to pay per annum, a proportionate part of an annuity of

By indentures of lease and release, dated the 29th of July 1818, being the settlement in contemplation of marriage, the testator, *Arthur Kempe*, conveyed a freehold estate called *Trevithick*, two third freehold parts of an estate called *Treburthes* to the use of himself for life, with remainder to that his then intended wife should take thereof of a leasehold estate thereafter assigned an annuity of 205*l.* for her life, with the usual powers of discharge. And by the same indenture the testator conveyed a leasehold estate called *Treburthes*, which he let for term of ninety-nine years, determinable upon the death of the last survivor of the testator and also one-third part being leasehold of the same called *Trenustrall*, to trustees upon trusts, corresponding with the uses of the freehold estates. Subject to the annuity the freehold and leasehold estates were so as to give to the testator the absolute disposal thereof.

Arthur Kempe, the testator, by his will dated the 10th of November 1822, after reciting the settlement

that so far as he had any power to do so the above annuity of 205*l.* should be payable in manner following, that is to say, the annual sum of 110*l.*, part thereof out of the estate called *Trevithick*, the annual sum of 15*l.*, further part thereof out of the freehold part of the estate called *Trenustrall*, and the remaining annual sum of 80*l.* out of the leasehold estate called *Treburthes*, and in the event of his interest in the leasehold estate called *Treburthes*, expiring before the annuity, then that the annual sum of 80*l.* should thenceforth be issuing and payable out of his freehold estate called *Beruppa*, which he thereby subjected and charged to and with the payment thereof accordingly. Subject and charged as aforesaid the testator gave and devised his freehold estates of *Trevithick* and *Trenustrall* to his son *Charles Trevanion Kempe*, his heirs and assigns for ever, and his freehold estate called *Beruppa* to his son *William Peter Kempe*, his heirs and assigns for ever. And he gave his residuary personal estate, including the leasehold estate called *Treburthes*, to his son *Charles Trevanion Kempe*.

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The estate of *Treburthes* was held by the testator on a lease, dated the 8th of *March* 1783, for ninety-nine years, determinable with the lives of the testator, *John Arthur Kempe* and *Charles Trevanion Kempe*.

The testator died on the 1st of *January* 1823.

Charles Trevanion Kempe, in *May* 1824, surrendered the old lease of *Treburthes*, and took a new lease for ninety-nine years, determinable with the lives of himself and his two sons. He died on the 22nd of *December* 1851, having survived the other two lives named in the old lease of *Treburthes* of 1783.

By his will dated the 28th of *March* 1849, he gave, devised

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devised and bequeathed all his freehold, leasehold and personal estate to the Plaintiff, *William Coryton Kempe*, his heirs, executors, administrators and assigns, and appointed him sole executor.

After the death of *Charles Trevanion Kempe*, the Plaintiff, *William Coryton Kempe*, called on the Defendant, *William Peter Kempe*, as the owner of the estate called *Beruppa*, to pay to the widow of the testator, *Arthur Kempe*, the annual sum of 80*l.*, being the part of her annuity charged by *Arthur Kempe's* will upon that estate in the event of the determination of the lease of *Treburthes*. On his refusal, the Plaintiff, *William Coryton Kempe*, with other parties interested, instituted the present suit, praying by the bill for a declaration that under *Arthur Kempe's* will, and in the events which had happened, the estate called *Beruppa* was liable to pay the annual sum of 80*l.* on account of the annuity of 205*l.*, in aid or exoneration to that extent of the other estates, which by the settlement of the 29th of July 18*58* were charged with that annuity, and for the requisite accounts and consequential directions.

The Master of the Rolls made a declaration substantially in conformity with the prayer of the bill, and the Defendant, *William Peter Kempe*, appealed.

Mr. Cairns, for the Plaintiffs.

The annuity is made payable by the will out of the *Beruppa* estate, in the event of the testator's interest in the leaseholds expiring before the annuity. This happened on the death of *Charles Trevanion Kempe*.

Mr. Lloyd and Mr. C. Hall, for the Appellants.

The word "interest" is sufficient to comprise the new term, which was obtained by means of the goodwill arising

from the testator's term. It cannot be said that the testator's interest determined on the death of *Charles Trevanion Kempe*, for the lease which was in existence at his death did not in any degree depend upon his life. Nor can it be said to have determined at any other period as regards the annuity, for the legatee could not by his own act determine the lease so as to relieve himself from the charge. The interest therefore still continues, and the charge remains also. The new lease must at all events be considered a graft upon the old one, and must be subject to the same equities, including that of the devisee of the estate called *Beruppa*.

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Mr. *Cairns* was not called on to reply.

The LORD JUSTICE KNIGHT BRUCE.

This case is almost too plain for argument. Upon the expiration of the testator's interest in the leasehold at *Treburthes* the estate called *Beruppa* became liable to pay 80*l.* per annum, in relief of the interest represented by the Plaintiff. I do not approve of the appeal.

The LORD JUSTICE TURNER concurred.

Appeal dismissed, with costs.

1854.

June 15, 26.

Before *The*
LORDS JUSTICES.

A bequest to a municipal corporation, to be applied by them in such manner for such purposes as they should judge to be most for the benefit and ornament of their town, is not void under the Mortmain Act.

Where trustees have by the terms of a gift a discretion to apply the benefit of it either in a way which the law allows or in one which the law disallows, the presumption ought to be, that the discretion will be exercised in the former mode.

THE MAYOR, ALDERMEN, AND BURGESSES
OF FAVERSHAM *v.* RYDER.

THIS was an appeal from a decision of the Master of the Rolls in favour of the validity of a charitable bequest, contained in the will of *Thomas Romsey*, dated the 15th of *September* 1798, whereby the testator bequeathed 1,000*l.* 4*l.* per Cent. Bank Annuities, after the death of his son in law and of the survivor of his daughters, upon a trust thus expressed:—"Upon trust to transfer the said 1,000*l.* 4*l.* per Cent. Bank Annuities unto the Mayor and Jurats of the town of *Faversham*, the county of *Kent*, being the place of my nativity, whom I give the said 1,000*l.* 4*l.* per Cent. Bank Annuities. My original intention was, that the same should have been applied towards the erection of a tower or steeple of the parish church there, but having been anticipated in that design by a late bequest, which is now carrying into execution, my desire therefore is, that the same may be applied in such manner, and for such purposes, as the said Corporation shall judge to be most for the benefit and ornament of the said town."

The case is reported in the 18th Volume of *Beavan's Reports* (a).

Mr. Roundell Palmer and *Mr. Hislop Clarke*, for Plaintiffs, who were the Respondents.

The charitable trust contained in this will can be performed without the acquisition of land. The bequeathed may be laid out on land already devoted to public purposes, and the testator, by stating his original intention

intention to have been to improve the parish church, **i**ndicates clearly that he had not in view any application **o**f the money at variance with the provisions of the **M**ortmain Act. Having regard to this indication of **i**ntention, it would be a breach of trust to make such an **a**pplication of the bequest.

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They cited and commented upon *Grimmett v. Grimmett* (a); *Soresby v. Hollins* (b); *Attorney-General v. Bowles* (c); *Crafton v. Frith* (d); and distinguished *Trye v. Corporation of Gloucester* (e).

Mr. Lloyd and Mr. Grove, in support of the appeal.

The will must be construed independently of the **M**ortmain Act. In *Attorney-General v. Williams* (f), the Lord Chancellor said that the Court would not alter **i**ts conception of the purposes of the testator merely **b**ecause those intentions happened to fall within the **S**tatute of Mortmain. If that Act did not exist, could **a**ny one doubt that it would be a proper execution of **t**his trust to purchase land? As such an application of **t**he money is within the scope, and is indeed the obvious **m**ode of executing the trust, the bequest is void. It is **n**ot, however, necessary to put the argument so high, for it is sufficient if the bequest holds out an inducement to **b**ring land into mortmain. This was decided in *Trye v. Corporation of Gloucester* (e), where the testator declared that no part of the bequest was to be applied in **p**urchasing land. If the trustees have an option, what **r**estraint will there be on their exercising it in violation of the Act?

They

(a) *Ambl.* 210.

(e) 14 *Beav.* 173.

(b) 9 *Mod.* 221.

(f) 4 *Bro. C. C.* 526; 2 *Cox,*

(c) 2 *Ves. sen.* 547; 3 *Atk.* 806. 387.

(d) 4 *De G. & Sm.* 237.

1855. They cited *Giblett v. Hobson* (a); *Attorney-General*
 THE v. *Parsons* (b); *Attorney-General v. Davies* (c); *Mathe-*
 MAYOR, &c. v. *Scott* (d); *Edwards v. Hall* (e); *Longstuff v. Ren-*
 OF nison (f).
 FAVERSHAM
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The LORD JUSTICE KNIGHT BRUCE referred to *Church*
Building Society v. Barlow (g).

Mr. *Hislop Clarke*, in reply, contended that *Attorney-General v. Williams* (h), if applicable, was in the Plaintiff's favour.

Judgment reserved.

The LORD JUSTICE KNIGHT BRUCE.

June 26. Whether the words "benefit and ornament of the said town," which the will in this case contains, ought to be deemed equivalent to "benefit or ornament of the said town," or ought not, and whether the will is considered, without reference to the statute, that we are in the habit of calling the Mortmain Act, or is not, the bequest in question, cannot, I think, be read as requiring or as intended to render necessary any acquisition of land in order to the performance of the trust declared, particularly when the Plaintiffs' corporate character and connection with the town of *Faversham* are recollected. It does not seem to me to have been or to be impossible, or even difficult, for them to adorn the town in a manner beneficial to it, without resorting to a course incapable of being testamentarily authorized; nor do they appear

(a) 3 *Myl. & K.* 517.

(b) 8 *Ves.* 186.

(c) 9 *Ves.* 535.

(d) 2 *Keen*, 172.

(e) 17 *Jur.* 593.

(f) 1 *Drew.* 28.

(g) 3 *De G. Mac. & Gor.* 120.

(h) 4 *Bro. C. C.* 526; 2 *Cox*, 387.

appear to have entertained or now to entertain any intention of contravening the law. Why then should the gift be deemed invalid ?

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THE
MAYOR, &c.
OF
FAVERSHAM
v.
RYDER.

"Semper in dubiis benigniora præferenda sunt (a)," is a good maxim of the civil law, which says well also, "Quotiens in stipulationibus ambigua oratio est, commodissimum est id accipi quo res de quâ agitur in tuto sit (b)." Nor, I apprehend, does our own law or reason allow us to interpret an instrument of disposition as intended by the maker to exceed his power or his right, where he has not by expression compelled such a construction. Why should we be willing to impute to a man a gratuitous preference of wrong to right, or of a course which will frustrate to a course that will effectuate his intention? If one orders a thing to be done but does not say how it is to be done, surely he must be taken to mean that it shall if possible be lawfully done.

The decision in the *Attorney-General v. Bowles* (c), may have been correctly departed from. I assume it to have been so. The principle, however, on which *Soresby v. Hollins* (d) was determined, a principle recognized, I think, by Lord *Lyndhurst*, in the House of Lords, in the case of *Attorney-General v. Mill* (e), seems to me indisputably right, and I consider consequently that, whether, upon the supposition of the statute not having passed, there would not or would be a breach of trust committed by laying out the legacy in question, or any part of it, in amelioration or alteration of the state of land, which in the testator's lifetime was not devoted or appropriated to any municipal or public or charitable purpose, or in acquiring

(a) Dig. lib. 1, tit. xvii. s. 56.

(d) 9 Mod. 221.

(b) Dig. lib. 45, tit. i. s. 80.

(e) 5 Bli. N.S. 593.

(c) 2 Ves. sen. 547.

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acquiring land, still the discretionary authority given to the Plaintiffs appearing to me to extend to a course not at variance with the statute, the bequest is valid and must have effect given to it.

The appeal, in my opinion, ought to be dismissed with costs.

The LORD JUSTICE TURNER.

Thomas Romsey, the testator in this cause, has by his will given the sum of 1,000*l.* 4*l.* per Cent. Bank Annuities, to trustees, upon trusts for the benefit of several persons during their lives and subject to those trusts, all of which have determined upon trust to transfer the same to the Plaintiffs, and he has declared his intention as to the fund to be transferred in the following terms. [*H*is Lordship read the bequest.]

The question upon this appeal is, whether this gift to the Plaintiffs is void by the Statute of Mortmain. The Master of the Rolls has been of opinion that it is not, and I agree in that opinion. The argument in support of the appeal was, that the gift necessarily involves either the purchase of land, or expenditure upon land already in mortmain,—that in the former case the gift would be clearly bad, and that in the latter it would be equally bad, the will not pointing to land in mortmain, as the land on which the money was to be expended; and several cases were cited upon this latter point. The whole argument, therefore, rested upon the point that this gift involves either the purchase of land or expenditure upon it. This, however, does not appear to me to be the case. The fund is to be applied in such manner and for such purposes as the Corporation shall judge to be most for the benefit and ornament of the town.

Keeping within the limits of benefit and ornament, the corporation has a wide discretion, not only as to the purpose for which, but as to the manner in which the fund should be applied. It is, as I conceive, quite within the limits of this trust, that the fund should be invested and the income of it perpetually applied for the purposes of benefit and ornament; and it cannot I think be said, that there can be no purpose of benefit or ornament, to which the fund or the income of it can be applied which would not involve the purchase of or expenditure upon land. Public seats, which would be both beneficial and ornamental, and would not even involve the permanent occupation of the land, may be placed in public walks or other places in the town, and other applications of a like nature might be pointed out, and, of course, if the law allows one mode of application and disallows another, it would be the duty of the corporation, as trustees, to apply the fund in the mode which the law allows, and not in that which it prohibits.

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THE
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I think, therefore, that this appeal wholly fails, and must be dismissed with costs.

1854.

Ex parte GEORGE JOHN GRAHAM AND
CHIM HEINRICH CLAUDIUS SATC

In the Matter of JAMES BLACK AND RICHARD
COPE, Bankrupts.

Feb. 10.

Before The
LORDS JUSTICES.

An indorsee for value of an accommodation bill, without notice that it is one of that description, may, notwithstanding notice subsequently acquired, release the drawer without releasing the acceptor.

THE Respondent was the indorsee for value of exchange for 288*l.*, accepted by the bank. It was in fact a bill accepted for the accommodation of the drawer, but the Respondent had no notice when the bill was indorsed to him. After he had notice of this fact he, with the other creditors of the bank, agreed to accept 8*s.* in the pound upon their respective debts, and upon payment thereof to release the bank from all further demands.

The Respondent received under this composition 115*l.* 4*s.*, and signed a memorandum (indorsing the bill), whereby he discharged the drawer from all claims and demands whatsoever in respect of the bill and the money thereby secured.

The acceptors were afterwards adjudicated bankrupts, whereupon the Respondent claimed to prove for 17*s.* being the balance due to him upon the bill of exchange after deducting the amount of the composition.

The assignees opposed the proof, on the ground that by releasing the principal debtor the Respondent released the bankrupts.

The Commissioner admitted the proof, and the Respondent now appealed.

Mr. *Bacon* and Mr. *Baggallay*, in support of the Appeal.

1854.

Ex parte
GRAHAM
and Another.

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The Respondent, when aware that the acceptors were **only** sureties for the drawer, thought proper to release **the** latter. The bankrupts being, and being known to **the** Respondent to be, sureties merely, were consequently **discharged**, and the proof ought to have been rejected; *Ex parte Glendinning* (a).

Mr. *Chandless*, for the Respondent.

The question is whether, after discounting for value **an** ordinary bill of exchange without notice that it is **an** accommodation bill, the indorsee can be, by subsequent notice, prevented from dealing with it otherwise **than** he might have done but for such notice. [*The LORD JUSTICE KNIGHT BRUCE* asked if the question was **not** unaffected by decision.] It may be in specie, but it **falls** within the principle that a purchaser for value, without notice, shall not be prejudiced by notice subsequently **acquired**. If it were not so in this case an innocent **indorsee** might by subsequent notice be precluded from **compounding** with either acceptor or drawer, for if he **released** the former he would discharge the latter at law, **and** if he released the latter the former would be **discharged** in equity.

He cited *Manly v. Boycott* (b); *Fentum v. Pocock* (c); *Harrison v. Courtauld* (d).

[*The LORD JUSTICE KNIGHT BRUCE* referred to *Bank of Ireland v. Beresford* (e)].

Mr.

(a) *Buck*, 517.

(b) 22 *L. J. (Q. B.)* 265.

(c) 5 *Tampt.* 192.

(d) 3 *B. & Ad.* 36.

(e) 6 *Dow.* 233.

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Mr. *Bacon*, in reply.

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There is no hardship in the case; the Respondent might have reserved his remedies against the bankrupts on accepting the composition. As he has not done so, the general rule applies.

The LORD JUSTICE KNIGHT BRUCE.

I cannot regard the composition deed as having had the effect alleged on behalf of the Appellants. The law and equity of such a case as this must be the same. In deciding, as we do, that the proof must stand, we are not contravening in any respect, as we conceive, *Ex parte Glendinning*.

The LORD JUSTICE TURNER concurred.

Appeal dismissed.

1853.

Nov. 4.

1854.

March 10.

**Before The
LORDS JUSTICES.**

**Before the
Orders in
Bankruptcy of
1852 came
into operation,
the Registrar
of a District**

Ex parte JAMES BATEMAN AND OTHERS.

In the Matter of JOHN BURBURY, a Bankrupt.

Before *The Lords Justices*. **THIS** was the Petition of the assignees and of some of the creditors appealing from the refusal of the Commissioner to direct the retaxation of the bills of costs of the solicitors to the estate. In *March* 1851 the bills had been taxed at 1,717*l.* 8*s.* 9*d.* by the Registrar of the District Court taxed the bills of the solicitors to the assignees without any one attending on their behalf, and a small payment was made on account of the bill. Two years afterwards the assignees applied to the Commissioner for a retaxation, on the grounds of extravagant charges, and that they had only recently become aware of the contents of the bill :—

Held, that the Commissioner ought, under the then existing law, to have reviewed the taxation.

Held, also, that the question was not one of sufficient difficulty or importance to justify the Court in giving leave to appeal from its decision to the House of Lords.

District Court at *Birmingham*, on the application of the solicitors, and 100*l.* had been since paid on account of the bills. In *April* 1853 the Appellants applied to the Commissioner for a retaxation on the special grounds, that the Appellants had not, nor had either of them, notice of the intention to tax such costs, and were not aware until a considerable time afterwards that such taxation had taken place; that no copy of the bills of costs was ever delivered to them, and that they were not aware of the charges contained therein until the months of *February* and *April* 1853, when Mr. *Kirby*, their present solicitor, having inspected the bills of costs upon the file of proceedings, informed the Appellants of the objectionable character of many of the items contained in the bills, and that the bills of costs, as so taxed, contained extravagant and improper charges.

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Mr. *W. M. James* and Mr. *W. Morris*, in support of the appeal.

The Commissioner considered the authority of *Ex parte Woolston* (a) applicable to the present case. We submit that the cases are wholly distinguishable. In *Ex parte Woolston* the bills had been taxed and paid nine years previously. The bills had been delivered to the assignees, and had been regularly taxed by the Commissioners, who were then the proper functionaries for that purpose; and moreover one of the solicitors and two of the assignees had died. The bills extended over a period of nearly ten years, and the Court rested its judgment on the fact, that for the nine years delay no substantial excuse had been offered. There has not, in truth, been any taxation in this case which the Court can recognize. The new orders did not come into operation before *January* 1853, and the validity of the taxation depends

on

(a) 3 *M. D. & D.* 702.

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BATEMAN
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on the antecedent practice, according to which the Registrar of a District Court had no authority to tax a bill of costs.

They also referred to *Ex parte Moore* (a) and *Ex parte Rees* (b).

Mr. Rolt and Mr. Selwyn, for the Solicitors.

This is not an appeal from the taxation already made. It is an application for a taxation de novo. The course of practice is for the bill of costs of the solicitor to the bankruptcy to be delivered to the official assignee, who submits it to the Registrar for taxation. It is never the practice for the official or trade assignees to attend by a separate solicitor, and it would be a very inconvenient and expensive practice to adopt. Here, however, extraordinary facilities for watching the taxation existed, for before it took place the assignees had thought fit to appoint their present solicitor to see that the solicitors to the estate did what was right. With regard to the authority of the Registrar, the Registrars of all the Courts were by the then existing law required to attend upon the Commissioners, and to take charge of all proceedings before them; and the 27th section of the Bankrupt Law Consolidation Act, 1849, which was then in force, empowers the Registrar to act for the Commissioner, so that the taxation must be treated as that of the Commissioner, and more especially as it has had his sanction. [The LORD JUSTICE KNIGHT BRUCE. Would this case fall within the 14th section of 6 Geo. 4, c. 16?] That Act was repealed by the 27th section of the Bankrupt Law Consolidation Act, 1849, and this taxation took place in 1851. In *Ex parte Moore*, the question was as to the costs of the petitioning creditor, and the taxation

must

(a) 1 Deac. 578.

(b) De Ger, 205.

must necessarily have been altogether *ex parte*, since no assignees had been chosen. No specific length of time was prescribed in *Ex parte Woolston* (a) as necessary to constitute the requisite special circumstance for re-taxation, and the employment of a separate solicitor here more than compensates for the difference of time. The case of *Ex parte Rees* (b) was altogether a different one.

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They also referred to *Ex parte Pemberton* (c).

Mr. W. M. James, in reply.

The provision of the 3 & 4 Will. 4, c. 47, s. 8, by which the District Registrars are empowered to tax costs in bankruptcy, as between party and party, shows that, before the Orders of 1852 came into operation, District Registrars had no authority to tax such costs as these.

THE LORD JUSTICE KNIGHT BRUCE.

It is unnecessary to say how this case would have stood if the bills had been paid, or if one possible effect of the Petitioners' success upon the present occasion might be, that there would be a repayment by the solicitors of any sum that they have received, for the bills have not in any sense of the phrase been paid. A sum of 100*l.* has been received on account, which, it is plain and admitted, must, in every possible event, be due to the solicitors and be retained by them. The rules, therefore, which apply to paid bills, do not apply here.

Again, if there had been a loss of documents, a loss of evidence, or of the means of affording information, by death or otherwise, that might have made a material difference

(a) 3 M. D. & D. 702.
(b) *De Ger*, 205.

(c) 2 *De G., Mac. & Gor.*
960.

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difference; but the case has no such ingredient, for I cannot consider the death of the gentleman who was official assignee, during the whole or part of the period which has been the subject of discussion, a material circumstance in the case, nor has it, indeed, been suggested on either side to be a material circumstance. Here, therefore, there are unpaid bills with the fullest opportunity on the part of the solicitors of perfecting their case, producing their evidence, and establishing their title to the just amount of what may be due, and no considerations which belong to a case, where possible injustice may be done to the solicitor by the proceeding, can have place here.

It is said that there has been a taxation, and that, therefore, there ought not to be another. That taxation was by a Registrar of one of the District Courts of Bankruptcy, and the taxation took place after the Bankrupt Law Consolidation Act of 1849, had come into force, but before the Orders of *October* 1852; and one question is, whether, in that state of things, a Registrar of one of the District Courts of Bankruptcy had authority to tax? Perhaps he might have had the authority if the case had been proved to come within that section of the Consolidation Act to which Mr. *Rolt* drew our attention, and which empowers the Registrar in certain circumstances to act for the Commissioner. But the case was not put upon that ground. The Registrar appears to have acted as if in the exercise of an ordinary jurisdiction, supposed to belong to him as a matter of course. Now I confess I doubt very much whether the jurisdiction did belong to him in the circumstances in which he exercised or professed to exercise it. But, assuming that the jurisdiction did belong to him, I am still of opinion that, as the law then stood (—without at all meaning to say how the law stands or will stand

stand with regard to cases which may come under the **operation** of the Rules or Orders of *October 1852*, as to **which** I am purposely silent—) it was incumbent upon **the** Commissioner to review the Registrar's taxation as **matter** of course, without having any objectionable item **proved** to him or brought to his attention.

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Taking that view of the case, I am released from the **duty** of examining the details of the bills, or of giving **any** opinion upon the items which have formed the **subject** of discussion. I repeat, that it is with great pleasure **that** I find myself exempt from the performance of that **duty**, especially as I might possibly, by entertaining a **view** on any of the items, be in a manner prejudging the **solicitors'** case, which I wish to leave perfectly open to **them**, thinking it very possible that they may be able **to establish** a just title to all that they have claimed.

I am of opinion that, upon the law which existed at **the** time to which it is material to look, it was a matter **of right** to have the taxation reviewed, and our order **will** be accordingly.

I may add, that, whatever may be the true view of the **evidence**, with regard to Mr. *Kirby's* employment, and **the** notice that he had, I am of opinion that he did not **stand** in a situation in which delay can be attributed to **him**, especially delay from which damage of any kind **has** been shown to have arisen to the solicitors **concerned**.

Upon the undertaking of the Petitioners to abide by **any** order respecting the costs, charges and expenses of **the** taxation and otherwise, that this Court may make, **declare** that these bills ought to be retaxed, and with that declaration refer the matter back to the District
Court

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Court of Bankruptcy, reserving the costs of this application and giving liberty to the parties to apply.

The LORD JUSTICE TURNER.

I am of opinion also, that the order must be in the form which my learned brother has suggested. Assuming the Registrar to be the proper officer to tax these bills, there must undoubtedly be a right in the Commissioner to review the taxation. Application was made to him for that purpose; he has refused to do so, and the question we have to consider is, whether he was right or wrong in that refusal.

I do not propose to give any opinion upon the question, whether the Commissioner was or was not bound as a matter of course, and without any special circumstances, to review that taxation, but I am of opinion that, under the circumstances of this case, he was bound to make that review.

The grounds which are urged in support of the Commissioner's judgment are two; first, that these parties, who are now presenting the present petition, had full knowledge of all the circumstances of the case, and therefore ought not now to be allowed to enter upon the taxation. Secondly, that there is no case made out of fraud or surprise. Now, with reference to the case of knowledge of the parties, it rests upon the fact of the assignees having employed a gentleman of the name of *Kirby*, for the purpose, as it is said, of watching the conduct of the solicitors, against whom the present petition is presented. Assuming it to be so, it is perfectly clear that Mr. *Kirby* did not attend the taxation of these bills of costs, and although I am by no means prepared to say and do not mean to intimate an opinion, that the consequence of that would be, that the bills ought to be sub-

mitted again to taxation, I think that the fact of there having been no other party before the Registrar, upon the taxation of the bills, is a consideration which renders it the duty of the Commissioner, and also the duty of the Court, more carefully to watch the proceedings which are had before the Registrar, upon the taxation of a bill.

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I agree that, there being no case of surprise, it is not upon the ground that too much or too little may have been allowed that this Court will open the taxation of a bill of costs, or direct the retaxation of one that has been already taxed. Where, however, there is a series of charges *prima facie* unreasonable (for I do not intend to intimate that any one of these charges may not be maintained in the result), and not attempted to be explained, that is, in my opinion, a matter requiring investigation, and quite falling within the rules by which the Court is guided in requiring such an investigation to be had. The learned Commissioner, if I may venture to say so, seems to have put a little too much reliance upon the observations that fell from Lord *Cottenham* in *Horlock v. Smith (a)*, which were addressed to a paid bill of costs, and not to a bill like the present, remaining unpaid.

I concur in the opinion which my learned brother has expressed.

Mr. *Rolt* and Mr. *Selwyn* now applied for leave to appeal from the above decision to the House of Lords. They relied upon the 14 & 15 *Vict.* c. 83, s. 10 (*b*), and on

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March 10.

(a) 2 *Myl. & Cr.* 495.

(b) "All decisions, decrees or orders of the Court of Appeal, including decisions in matters of bankruptcy, shall be subject to

appeal to the House of Lords in the cases and under the conditions in and under which the like decisions, decrees or orders of the Lord Chancellor would have been

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on the 12 & 13 *Vict.* c. 106, s. 18 (a), and cont that in the present case there was matter both of law and equity fit to be the subject of appeal.

Mr. *W. M. James* and Mr. *W. Morris*, for the respondents, were not called upon.

The LORD JUSTICE TURNER.

The Court is always indisposed to refuse an application for leave to appeal against a judgment pronounced by itself. But it is bound to perform the duty of giving effect to the provisions of the Act of Parliament, and to exercise the best discretion it can in applying them.

Now the Bankrupt Law Consolidation Act, an

subject to such appeal if this act had not been passed; but the appeal to the House of Lords in matters of bankruptcy shall be only on matters of law or equity, or on the rejection or admission of evidence, and on a special case, to be approved and certified by one of the judges of the Court of Appeal hereby constituted, whose determination on the settlement of such case shall be final and conclusive."

(a) "That if the Lord Chancellor shall in any case deem any matter of law or equity, brought before him by way of appeal, to be of sufficient difficulty or importance to require the decision of the House of Lords, or in case both parties in any proceeding before the Vice-Chancellor shall desire that any such matter may be determined in the first instance by the House of Lords

and not by the Lord Chancellor then and in such case the facts whereupon such question of law or equity shall arise shall be stated in the form of a petition for appeal to the House of Lords, and the party appealing may cause an appeal to the House of Lords to be made in like manner as other appeals are now preferred to that house: provided always, that the cases to be referred to the House of Lords shall be confined in the first instance to cases of fact—in cases of appeal from the Lord Chancellor, to the Lord Chancellor, to the Vice-Chancellor; and in case of appeal from the Vice-Chancellor to the Lord Chancellor, to setting forth a special case, to be approved and certified by the Vice-Chancellor, and to submit arguments on the point of law, and the parties may be advised by counsel."

Act constituting this Court, have provided that in matters of bankruptcy an appeal is to be carried to the House of Lords only in those cases in which the Court shall deem any matter of law or equity brought before it, by way of appeal, to be of sufficient difficulty or importance to require the decision of the House of Lords. It is therefore the duty of the Court not to send this question to the House of Lords, unless it considers the matter one not only of sufficient difficulty, but also one of sufficient importance. I confess that I do not view this case as one of much difficulty, and certainly not as one of sufficient importance to justify the Court in acceding to this application.

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The LORD JUSTICE KNIGHT BRUCE concurred.

Application refused, with costs.

Ex parte ROBERT PALMER HARDING.

In the Matter of JOHN PICKERING.

April 22.

THIS was an appeal from the refusal of Mr Commissioner *Holroyd* to expunge a proof.

Before *The*
 LORDS JUSTICES.

In *October* 1845 the Respondent, Mr. *Thornthwaite*, commenced an action in assumpsit against the bankrupt to recover 17,755*l.* 5*s.*, the balance of an account current.

In an action to recover the balance upon an account current, a verdict for the Plaintiff was

On taken by con-

sent, subject to a reference to an arbitrator, who was empowered to direct that a verdict should be entered for the Plaintiff or Defendant, and the costs were to abide the result of the award. After the award, which was in favour of the Plaintiff, and before judgment, the Defendant committed an act of bankruptcy, of which notice was given to the Plaintiff in the action, but judgment was nevertheless entered up upon the award. On the Defendant being adjudicated a bankrupt,—*Held*, that the amount for which judgment was entered up, with interest and costs, constituted a recoverable debt.

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On the 3rd of *February* 1849 the action was tried, and a verdict was taken by consent for 100,000*l.*, subject to a reference. By the order of reference the arbitrator was empowered to direct that a verdict should be entered for the Plaintiff or the Defendant, as he should think proper, and the costs of the suit, to be taxed, were to abide the result of the award; and the costs of the reference and the award, to be taxed, were to be in the discretion of the arbitrator; and neither of the parties was to bring or prosecute any writ of error, or any action or suit at law or in equity against the arbitrator, or against each other, or concerning the matters in the order; and either of the parties was to be at liberty to make the order a rule of Court.

The meetings before the arbitrator commenced in *June* 1847, and went on at intervals up to *May* 1850, when the arbitrator died. In *November* 1850 another arbitrator was nominated, who took up the reference, and several subsequent meetings were held. After the reference had been in prosecution for above six years, namely, on the 5th of *May* 1853, an award was made in favour of the Plaintiff for 11,345*l.*

On the 9th of *May* 1853, four days after the award was made, the Defendant committed an act of bankruptcy by filing a declaration of insolvency, of which the Plaintiff had notice on the same day.

On the 12th of *May* 1853 judgment was signed, and the costs taxed, and the Defendant's attorney attended the taxation. No application was made to set aside the award.

On the 30th of *June* the Defendant was adjudicated bankrupt, and on the 20th of *July* the proof in question

tion was tendered and admitted on the proceedings for 12,210*l.* 17*s.* 10*d.*, being 12,147*l.* for damages and costs, and 63*l.* 17*s.* 10*d.* for interest from the 12th of *May* to the day of filing the petition for adjudication.

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An application was then made to the Commissioner to expunge the proof, upon the ground that the judgment upon which the proof was founded was not signed till after the Plaintiff had notice of the act of bankruptcy, which was proved in support of the adjudication, and the Commissioner made the decision under appeal, refusing the application.

The Commissioner held that the cases of *Robinson v. Vale* (a), *Ex parte Birch* (b), *Greenway v. Fisher* (c), and *Ex parte Butterfill* (d), cited in support of the application, did not apply, but that *Ex parte Helm* (e), *Ex parte Poucher* (f), *Ex parte Ferris* (g), and *Ex parte Cocks* (h), were decided upon principles analogous to those which ought to govern the present case. The Commissioner considered that the Plaintiff, in signing judgment, was only taking the steps necessary to complete a right which was vested in him by the verdict and the award before he had any notice of the act of bankruptcy, and that under such circumstances notice of the act of bankruptcy could have no effect against the Plaintiff's right of proof upon the judgment.

Mr. *Swanston* and Mr. *Willes*, in support of the appeal.

In *Ex parte Butterfill*, Lord *Eldon* said, that judgment

- (a) 2 B. & C. 762.
- (b) 4 B. & C. 880.
- (c) 7 B. & C. 436.
- (d) 1 Rose, 192.

- (e) Mont. & M. 70.
- (f) 1 Gl. & J. 385.
- (g) 2 M. D. & D. 746.
- (h) De Ger, 446.

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PICKERING.

ment after the commission was just nothing at all. Here, it is true, the judgment was not after the petition for adjudication, but that circumstance makes no substantial difference. The judgment was after the act of bankruptcy, to which the adjudication has relation, regards all who had notice of it. The title of the assignees is, as against such persons, as complete from the time when the act is committed as it is from the time when the assignees are appointed.

They also cited *Ex parte Bryant* (a), *Ex parte Keenhead* (b), *Ex parte Mudie* (c), *Ex parte Moody* (d), *Cottam v. Partridge* (e).

Mr. Rolt, Mr. Hoggins and Mr. Hardy, appeared for the Respondent, but were not called upon.

The LORD JUSTICE KNIGHT BRUCE.

Mr. Thornthwaite, claiming to be a creditor of Mr. Pickering, brought an action against him in 1845. The action was defended and brought to trial in the early part of 1847, and was then referred to arbitration. The arbitration continued pending until the early part of May 1853; the only question having been, whether there was a debt or no debt between two traders. The award at last is made. Mr. Pickering, the Defendant, having ascertained the award to be against him, immediately resorts to the course of filing a declaration of insolvency, no doubt with the object of preventing the creditor, whose proceeding had thus been delayed from some time in the year 1845 to 1853, from obtaining any benefit from it, if such a proceeding could delay or prevent it. Now whatever might have been the

(a) 1 Ves. & B. 211.

(b) 1 Rose, 149.

(c) 3 M. D. & D. 66.

(d) 2 Rose, 413.

(e) 2 Man. & Gr. 843.

the result of an application like the present, at the instance of Mr. *Pickering*, the present proceeding is on the part of one of the assignees, at the instance, it is said, of various creditors of *Pickering*, and we must deal with the case according to the merits. Now the award was made certainly before any act of bankruptcy was committed. I have already said that the act of bankruptcy was resorted to because of the award.

1854.

Ex parte
HARDING.

In re
PICKERING.

The award has been compared to a verdict, and it was said that an award, unless followed by judgment, is nothing, and the judgment on the award was after the act of bankruptcy committed by Mr. *Pickering*, and after notice of that act of bankruptcy. Notice was given as the act of bankruptcy might have failed of the intended effect, unless there had been notice. Now the comparison to a verdict is to a certain extent just, but does not hold throughout. The award may be tantamount to a verdict, but it is not only that, it is that and something more, it being obvious that a verdict may be questioned on grounds on which an award cannot; and my opinion is, that if the award here can be questioned at all in a proceeding of this description, it can only be questioned on grounds on which it might have been disputed in a Court of Law. But I have certainly not at present heard any reason stated that satisfies me, or makes me think it probable, that the award could have been disputed effectually in a Court of Law. If, however, the Counsel for the present Petitioner consider the case not to have been gone into so fully as it might have been, and desire to add to the argument, we shall not decline to listen to them. Subject to that, the award must, I think, stand. It is a good substratum of debt, although there was no judgment before the act of bankruptcy, of which the creditor had notice, and it must be accompanied by a right to prove for

1854.

Ex parte
HARDING.

In re
PICKERING.

the costs given by the award. Therefore, subject what I have said, the objection, if there is any objection, to the proof is mere matter of form, and not substance.

The LORD JUSTICE TURNER.

An action was brought in 1845 upon an account current. At the trial of the action a reference to arbitration was directed, to ascertain the amount due, the verdict be entered for whatever the arbitrator should find to be justly due. The whole account was gone into before the arbitrator, and there was an award before an act of bankruptcy and judgment after the act of bankruptcy. It was argued that this was no more than a verdict, and was no estoppel, as was laid down in *Ex parte Butterfill* (a). No doubt a verdict, being open to review upon a new trial, is not to be taken as conclusive, but the argument passes by the material circumstance of the case being, in addition to a verdict here, a valid agreement for valuable consideration, that the amount to be found due by the arbitrator should be the amount to be recovered in the action, and for which judgment should be entered up, and that such judgment, when entered up, should be binding on both parties. Mr. Willes's argument was this—that the arbitrator is in the place of a jury. But he is in the place of a jury in this sense, viz. he is in the place of a jury whose verdict the parties here have agreed shall be final and conclusive. When, therefore, it is agreed that the verdict shall be final, the authority of *Ex parte Butterfill* ceases to apply. In one sense, the verdict of the arbitrator might not be conclusive, for it might be shown to be bad in law, and the question might be brought within the authority of *Ex parte Butterfill*, by showing that upon application being

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(a) 1 Rose, 192.

made to a Court of Law, the judgment of the arbitrator might have been set aside. In the absence however of any circumstance tending to show that the award could have been impeached in a Court of Law, I feel no doubt that the proof was properly admitted.

1854.
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*Ex parte*  
HARDING.  
*In re*  
PICKERING.

Appeal dismissed with costs.

*Ex parte* GEORGE RUSSELL.

In the Matter of THOMAS MINNITT, a Bankrupt.

**T**HIS was the appeal of the trade assignee from the decision of Mr. Commissioner *Balguy*, allowing two sums of 15*l.* and 6*l.* to Mr. *Harris*, the official assignee, for the preparation of the balance-sheet and accounts of the bankrupt.

*April 28.*  
Before The  
LORDS JUSTICES.

The 160th section of the Bankrupt Law Consolidation Act, which empowers the Commissioner to make an allowance out of the estate to such person as he shall think fit for the preparation of the balance-sheet and accounts of the bankrupt, does not authorize an allowance to the official assignee, such an employment being inconsistent with his duties.

At a sitting held on the 17th of *March* 1854, to audit the accounts of the assignees, the official assignee rendered an account of his receipts and payments, which the Commissioner allowed and passed.

Upon the credit side of such account there were the following items:—

| 1853.    |                                                  | £  | s. | d.  |
|----------|--------------------------------------------------|----|----|-----|
| Dec. 31. | By cash paid, preparation of balance-sheet . . . | 15 | 0  | 0   |
| 1854.    |                                                  |    |    |     |
| Feb. 11. | Preparation cash account and sale account . . .  | 6  | 0  | 0   |
| "        | Official assignee, audit remuneration . . .      | 63 | 2  | 0   |
| "        | Postage, &c. . .                                 | 18 | 12 | 4   |
|          | C C 2                                            |    |    | The |

1854.

*Ex parte*  
RUSSELL.*In re*  
MINNITT.

The Appellant deposed, that upon an examination the official assignee's audit account, and upon inquiry in the facts of the case, he ascertained, as the fact was, that the two sums of 15*l.* and 6*l.* had been retained by the official assignee as a remuneration to himself for the preparation of the bankrupt's balance-sheet, and of the cash and sale accounts, such cash and sale accounts being, in fact, those which were required by the Commissioner at the different meetings; and that the official assignee had, as the accountant of the bankrupt, prepared those accounts and the balance-sheet on the bankrupt's behalf; and that he (the deponent) had further ascertained, and that it was the fact, that the item 63*l.* 2*s.*, so allowed to the official assignee as audit remuneration, included a charge or allowance of 20*l.* to himself for the examination by himself, as such official assignee of the balance-sheet, cash and sale accounts which, in his capacity of accountant for the bankrupt, he had himself prepared, and for the preparation of which, on the bankrupt's behalf, he had been paid out of the estate.

On the 24th of *March* 1854 an order or memorandum was signed by the Commissioner, which was as follows:-

"In the matter of *Thomas Minnitt*, a bankrupt, the 24th day of *March* 1854. The balance-sheets and accounts filed in this Court having been frequently found to be most unsatisfactory, and the consequent adjournments and costs very detrimental to the estates of bankrupts and to the dividends of their creditors, and the 160th clause (a) of the Bankrupt Law Consolidation Act, 1847, having

(a) "That the bankrupt shall prepare such balance-sheet and accounts, and in such form as the Court shall direct, and shall subscribe such balance-sheet and accounts, and file the same in Court, and deliver a copy thereof to the official assignee, ten days at least before the day appointed for the last examination, or the

having given to the Court the power, on the application of an assignee or of a bankrupt, of making an allowance out of the estate for the preparation of such balance-sheets and accounts, and to such person as the Court shall think fit, it has been thought expedient to give a trial to the practice for some years pursued in the *Leeds* district, to direct such balance-sheets and accounts to be prepared in the office and under the superintendence of the official assignee, and to grant to him a moderate remuneration for such additional services. And upon the application of the above-named bankrupt, and being satisfied that he required assistance in the preparation of his accounts, I having required Mr. *John Harris*, the official assignee of this Court, to give such assistance, and taking into consideration that the usual charge of accountants so employed will vary from 20*l.* to 100*l.* and upwards, I do now direct that the sum of 21*l.* be allowed in his accounts under the 160th section of the Bankrupt Law Consolidation Act, as a moderate and just and a further remuneration to him for the services thus rendered to my satisfaction.—*J. Balguy.*"

1854.

*Ex parte*  
RUSSELL.

*In re*  
MINNITT.

The Appellant further stated, that prior to the 24th  
of

adjournment day thereof, for that purpose; and such balance-sheet and accounts before such last examination may be amended from time to time as occasion shall require and such Court shall direct; and the bankrupt shall make oath of the truth of such balance-sheet and accounts whenever he shall be duly required by the Court so to do; and the last examination of the bankrupt shall in no case be passed unless his balance-sheet shall have been duly filed as

aforesaid; and the Court may, on the application of the assignees, or of the bankrupt, make such allowance out of the estate of the bankrupt for the preparation of such balance-sheet and accounts, and to such person as the Court shall think fit, in any case in which it shall be made to appear to the satisfaction of the Court, from the nature of the accounts, or other good cause, that the bankrupt required assistance in that behalf."

## CASES IN CHANCERY.

It is to be observed that no application was ever made to the Court for the disallowance of the accounts, or on behalf of the bankrupt, or by any assignee of the estate of the bankrupt, in the proceedings in the bankruptcy, that the accounts were taken and prepared without any charge to the bankrupt's estate, and moreover that there was nothing whatever either in the nature of the bankrupt's accounts, or his own conduct, which could render it expedient or right that the expense of preparing the balance-sheet and accounts should be thrown upon his estate.

The Petition of appeal prayed for a readmit of the accounts, and that the sums of 15*l.* and 6*l.* might be disallowed; or if the Court should be of opinion that those sums ought to be allowed, then that the Court would be pleased to disallow so much of the sum of 63*l.* 2*s.* as was made up of the allowance to or charge by the official assignee for examining the balance-sheet and accounts of the bankrupt.

Mr. *W. M. James* and Mr. *Hardy*, in support of the appeal.

Such a practice as that of which the present appeal complains is contrary to public policy. The official assignee is an officer of the Court, and cannot be permitted to transact any business upon the retainer of the bankrupt. Indeed it is contrary to the terms of the Act that he should carry on any trade or business. The examination of the accounts is an important part of the duty imposed upon the official assignee, and he cannot discharge it as a proper person to prepare those accounts. Moreover the 13th rule of October the 19th, 1852, expressly provides for the payment of the official assignee for

for the duty of examining the balance-sheet and accounts of the bankrupt.

Mr. Bacon and Mr. J. V. Prior, for the official assignee.

1854.

*Es parte*  
RUSSELL.  
*In re*  
MINNITT.

The Commissioner has jurisdiction conferred upon him by the 12th section of the Bankrupt Law Consolidation Act to adopt the practice which he has sanctioned, and which is calculated to effect a great saving of expense. The result of overruling the decision of the Commissioner would be to throw the estates of bankrupts into the hands of accountants. The official assignee is not in such a case retained by the bankrupt, but by the Commissioner, and is paid not by the bankrupt, but out of the estate.

*The LORD JUSTICE KNIGHT BRUCE.*

There can be no doubt but that this is a difficult and perplexing Act of Parliament in many parts, and it ought not to be matter of surprise that different opinions should be entertained on it. The section in question has never, so far as I recollect, been brought under my judicial attention on any former occasion. The point which we are now to decide is, whether the official assignee is a person who can become entitled to a benefit or an allowance under the clause. It is said that he may, as being included under the generality of the words, "such person as the Court shall think fit;" but I think that it is against the spirit and policy, and contrary to the real purpose, of the Act, considering the position and duties of the official assignee, to hold that he comes within these words. I am of opinion that he does not come within them, and that, according to the safe, wholesome and legitimate interpretation of this section, he cannot receive an allowance for the preparation of the bankrupt's balance-sheet. As the Commissioner has proceeded solely on this section, we think that  
the

1854.  
*Ex parte*  
 RUSSELL.  
*In re*  
 MINNITT.

the items in dispute must be struck out on the ground that the allowance of them is based upon a construction of the statute to which we cannot accede.

*The LORD JUSTICE TURNER.*

In disposing of this case, I desire it to be understood that I do not proceed on the ground that favour has been shown to the bankrupt, or that injury has been done to his estate. I decide it on an important general principle.

The 160th section provides, that the bankrupt shall prepare a balance-sheet and accounts, and that the Court may make such an allowance to the bankrupt, for the preparation of the balance-sheet and accounts, and to such person as the Court shall think fit, in any case in which it shall be made to appear to the satisfaction of the Court, that the bankrupt requires assistance in that behalf. The question is this, whether it is or can be consistent with the provisions of the Act to make such allowance to the official assignee for preparing the bankrupt's balance-sheet and accounts, the fact being that the official assignee has been so employed. This must be determined by considering what are the duties of the official assignee. According to the provisions of the section, the bankrupt is to prepare such balance-sheet and accounts, and in such form as the Court shall direct, and is to file the same in Court, and deliver a copy to the official assignee at least ten days before the day appointed for the last examination. The accounts then are to be delivered to the official assignee, which evidently is directed to be done, in order that he may examine and check them. The bankrupt is to make out the accounts. The official assignee has possession of the bankrupt's books, which have to be delivered to him, and it is then his duty to check the accounts.

In these circumstances, what are the principles applicable to the case? Two or three cases show what those principles are. Take the practice of Courts of Equity as to the appointment of a Receiver. It has long been a settled rule that no Master of the Court can be appointed a Receiver, because it is part of the official duty of a Master to check the accounts of Receivers; and though he may have nothing to do with the accounts of that particular estate, the Court holds that it would be unsafe to allow him to act in that capacity. Again, in the case of a lunatic's estate it is a settled rule that the committee shall not be appointed Receiver. Another case nearer to the present is where a bankrupt is chosen assignee of his own estate. This happened in Mr. *Boldero's* case, whose creditors had so much confidence in him that they appointed him assignee, but the Court removed him, on the ground that his duties as assignee were inconsistent with his position as a bankrupt. So in the present case, the duty of preparing the balance-sheet is inconsistent with that of examining it.

It has been said, that the effect of a decision by us against the rule of the Commissioner will be to throw the estates of bankrupts into the hands of accountants to the injury of the creditors. I have too much confidence in the Commissioners to apprehend any such result. I am satisfied that they will exercise a sound discretion as to making allowances out of the estates of bankrupts for the preparation of the accounts.

Again, it has been argued that no evil can arise from the rule laid down by the Commissioner, as the items of the accounts have to be vouched. But this is a short-sighted view; for if the first accounts rendered by the bankrupt are insufficient, a further account will be called for, and if the official assignee has been employed to make

1854.

*Es parte*  
RUSSELL.

*In re*  
MINNITT.



1854.

*Ex parte*  
RUSSELL.*In re*  
MINNITT.

make out the accounts, he cannot, in dealing with the further accounts, avoid a bias arising from the fact of having been his duty to make the first accounts complete.

There is another circumstance in this case to which I think it right to advert. I think that it is the duty of the Commissioner to determine in each particular case whether the expense of preparing the balance-sheet and accounts ought to be allowed out of the estate, and that the laying down any general rule on that head is in contravention of the act, as interfering with the exercise of that discretion which the act intended to be exercised by the Commissioner. The items of 15*l.* and 6*l.* objected to must therefore be disallowed, but under the circumstances, the costs of both parties will be given out of the estate.



*Ex parte* THE REV. JOHN HOPKINS BAILE  
AND WILLIAM CARTER.

April 22, 28.

Before The  
Lords Jus-  
TICES.

A benefit building society is not entitled, on the bankruptcy of its treasurer, to priority over the other creditors.

In the Matter of JOHN BARRELL, a Bankrupt.

THIS was the appeal of the trustees of the *Barnstaple and Chafford Benefit Building Society* from the rejection, by the Commissioner, of the application of the Appellants to be paid in full 777*l.* 14*s.* 9*d.*, being the amount due from the bankrupt in respect of his receipts as treasurer of the Society.

By the Friendly Societies Amendment Act (a), s. 12, is enacted, "That if any person already appointed, or who may hereafter be appointed, to any office in a society established under the said recited act (b) or this act, and being entrusted with the keeping of the accounts, or

having

(a) 4 &amp; 5 Will. 4, c. 40.

(b) 10 Geo. 4, c. 56.

having in his hands or possession, by virtue of his said office or employment, any monies or effects belonging to such society, or any deeds or securities relating to the same, shall die or become a bankrupt or insolvent, or have any execution or attachment or other process issued, or action or diligence raised against his lands, goods, chattels or effects, or property or estate heritable or moveable, or make any assignment, disposition, assignation or other conveyance thereof for the benefit of his creditors, his heirs, executors, administrators or assignees, or other persons having legal right, or the sheriff or other officer executing such process or the party using such action or diligence, shall within forty days after demand made in writing by the order of any such society or committee thereof, or the major part of them assembled at any meeting thereof, deliver and pay over all monies and other things belonging to such society to such person as such society or committee shall appoint; and shall pay out of the estates, assets or effects, heritable or moveable, of such person all sums of money remaining due which such person received by virtue of his said office or employment, before any other of his debts are paid or satisfied, or before the money directed to be levied by such process as aforesaid, or which may be recovered or recoverable under such diligence, is paid over to the party issuing such process or using such diligence; and all such assets, lands, goods, chattels, property, estates and effects shall be bound to the payment and discharge thereof accordingly."

1854.  
*Ex parte*  
**BAILEY**  
 and Another.  
*In re*  
**BARRELL.**

By the Building Societies Act (a), s. 4, it is enacted,  
 "That all the provisions of a certain act made and passed  
 in the tenth year of the reign of his late Majesty King  
 George the Fourth, intituled 'An Act to consolidate and  
 amend the Laws relating to Friendly Societies,' and also  
 the

(a) 6 & 7 Will. 4, c. 32.

1854.

*Ex parte*  
*Bailey*  
 and Another.  
*In re*  
*Barrell.*

the provisions of a certain other act made and passed the fourth and fifth years of the reign of his present Majesty King *William* the Fourth, intituled 'An Act to amend an Act of the tenth year of his late Majesty King *George* the Fourth, to consolidate and amend the Laws relating to Friendly Societies,' so far as the same or any part thereof may be applicable to the purpose of any Benefit Building Society, and to the framing, certifying, enrolling and altering the rules thereof, shall extend and apply to such Benefit Building Society, and the rules thereof, in such and the same manner as if the provisions of the said acts had been herein expressly re-enacted."

By the Bankrupt Law Consolidation Act, s. 1, it is enacted, "That from and after the commencement of this act the several acts and parts of acts set forth in the schedule (A) to this act annexed, to the extent to which such acts or parts of acts are by such schedule expressed to be repealed, and every other act or acts, and such parts of every other act or acts, as shall be inconsistent with this act, shall be repealed, except so far as the said acts or parts of acts, or any of them, whether mentioned or included in the said schedule or not, repeal any former act or part of an act; and except also so far as may be necessary for the purpose of supporting any proceedings taken or to be taken under and after the commencement of this act upon any trading, act of bankruptcy, petitioning creditor's debt, fiat or other proceeding in bankruptcy before the commencement of this act, and except as to the recovery and application of any penalty for any offence which shall have been committed before the commencement of this act."

By section 167 of the same act it is enacted, "That if any person already appointed or employed, or who may be hereafter appointed to or employed in any office

in

in any society established under any of the acts relating to Friendly Societies, and being intrusted with the keeping of the accounts, or having in his hands or possession by virtue of his office or employment any monies or effects belonging to such society, or any deeds or securities relating to the same, shall have been or shall become bankrupt, the Court shall, upon application made by the order of any such society, or any committee thereof, or the major part of them assembled at any meeting thereof, order payment and delivery over to be made to such society, or to such person as such society or committee may appoint, of all monies and other things belonging to such society; and shall also order payment out of the estate and effects of the bankrupt of all sums of money remaining due which the bankrupt received by virtue of his said office or employment, before any other of his debts are paid and satisfied."

1854.

*Ex parte*  
BAILEY  
and Another.  
*In re*  
BARRELL.

By section 187 it is enacted, "That the Court shall, whenever it shall think fit, appoint a public sitting to be holden after the sitting appointed for the last examination of the bankrupt, when there are assets wherewith a dividend may be made (of which public sitting, and of the purport whereof, twenty-one days' notice shall be given in the *London Gazette*), to make a dividend of the bankrupt's estate, and shall at such sitting direct such part of the net produce of the bankrupt's estate as it may think fit to be forthwith divided amongst such creditors as have proved debts under the bankruptcy, in proportion to their respective debts, and shall make an order in writing, under the hand of the commissioner, for dividend accordingly."

Mr. *Swanston* and Mr. *T. H. Terrell*, in support of the appeal.

Independently of the Bankrupt Law Consolidation  
Act

1854.  
*Ex parte*  
 BAILEY  
 and Another.  
*In re*  
 BARRELL.

Act it is clear that the Appellants would have been entitled to payment in full under the 6 & 7 Will. 4, c. 32, s. 4. But it will be contended that the Bankrupt Law Consolidation Act has changed this by incorporating only the clause from the Friendly Societies Act, and not expressly adverting to the extension of the provisions of that act by the Building Societies Act to Societies of the latter description. As, however, the Building Societies Act provided that the acts relating to Friendly Societies should extend to Building Societies, it was unnecessary to repeat that provision in the Bankrupt Law Consolidation Act, although one of the provisions of the Friendly Societies Acts was unnecessarily repeated in the Bankrupt Law Consolidation Act. [They referred to *Walker v. Giles (a)*.]

Mr. Rolt and Mr. Bagley, for the Respondent.

The Bankrupt Law Consolidation Act repeals all acts inconsistent with its provisions. Now those provisions direct a rateable distribution of the property of a bankrupt among his creditors; and the case now before the Court is not excepted from them.

Mr. Swanston, in reply.

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The LORD JUSTICE KNIGHT BRUCE.

April 28.

As I view this case it is, upon the present contest, immaterial whether the entries in the Petitioners' pass-book, alleged to have been forged by the bankrupt, or by his direction, were forged or genuine. But it may be right to state that the learned Commissioner, whose decision is under appeal (Mr. Serjeant Goulburn), in form

(a) 6 Com. B. 662.

forms us that he heard and disposed of the matter without being apprised and without being aware that any forgery whatever had been committed or was imputed. I will assume in favour of the Petitioners, though without deciding, that if the Consolidation Act of 1849 had not passed they would have been entitled, substantially, to what they ask of the Court. Still there remains, I think, an insurmountable difficulty in their way arising from that statute, which properly construed appears to me to preclude their claim, unless falling within its 167th section. But this section I cannot interpret as extending to their case; and considering the legislature to have cut them off from all right of recourse for any present purpose to the acts of *William* the Fourth, mentioned in the argument, I apprehend that even on the assumption that I have stated (an assumption, perhaps, too favourable to the Petitioners) the petition must be dismissed with costs.

1854.

*Ex parte*  
BAILEY  
and Another.

*In re*  
BARRELL.

*The* LORD JUSTICE TURNER.

This was a petition on the part of the trustees of a Benefit Building Society to be paid out of the estate of the bankrupt, who was the treasurer of the Society, the sum of 777*l.* 14*s.* 9*d.*, the full amount of the monies received by the bankrupt on account of the Society, and not paid over by him according to the Society's rules. The case on the part of the Petitioners was rested, in the first instance, on the 167th section of the Bankrupt Law Consolidation Act, by which it is enacted, &c. [His Lordship read the section, set out *ante*, p. 382.] And it was further argued on the part of the Petitioners, that if they were not entitled to the relief prayed by the petition, under the provisions of the Consolidation Act, they were entitled to that relief under the combined operation of the 4 & 5 *Will.* 4, c. 40, s. 12, the Friendly Societies Amendment Act, and the 6 & 7 *Will.* 4, c. 32, s. 4, the

1854.  
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Es parte
 BAILEY
 and Another.
In re
 BARRELL.

the Benefit Building Societies Act, the 12th section the former act providing—[His Lordship read the section set out *ante*, p. 380.] And the 4th section of the last act enacting—[His Lordship read the section, set *ante*, p. 381.]

I am of opinion, however, that the Petitioners are entitled under any of these enactments to the relief which they ask. The 167th section of the Consolidation Act is in terms confined to societies established under the acts relating to Friendly Societies, and this society established not under any of those acts, but under the Benefit Building Societies Act. The legislature, when it passed the Consolidation Act, must be presumed to have had, and no doubt had, under its view, the provisions both of the acts relating to Friendly Societies and those relating to Benefit Building Societies. It is not thought proper to limit the particular relief granted by this section to Societies of the former description, as the Courts have no power to extend that relief to other Societies.

If, therefore, the Petitioners have any claim to that relief, their right must be founded upon the combined operation of the other acts; but the Consolidation Act has, by the 1st section, repealed not only the particular acts which are specified, but all other acts and parts of acts which are inconsistent with that act, and it has by its other provisions appropriated the whole estate of the bankrupt to the payment of certain descriptions of creditors, who, according to that act, are entitled to be paid in full, and subject thereto to the payment of the other creditors, in proportion to their respective debts; and it would clearly be inconsistent with these provisions that payment in full should be made to any creditor whose debt is not by the act directed to be so paid.

am of opinion, therefore, that the 4th section of the 6 & 7 Will. 4, c. 32, is repealed by the Consolidation Act, and consequently that this petition must be dismissed.

1854.

Ex parte
BAILEY
and Another.

In re
BARRELL.

The learned Commissioner has disposed of the case upon other grounds, as to which, without meaning to express any dissent whatever, I do not think it necessary to give any opinion, but the Petitioners have come here asking for a preference, to which, in my judgment, they are not entitled, and they must pay the costs of the petition.



Ex parte SAMUEL HUNT and SAMUEL HUNT
the Younger.

July 21.
Before The
LORDS JUSTICES.

In the Matter of THOMAS MacKENNA, a Bankrupt.

August 5.

Before The
LORD CHANCELLOR.

THIS was an appeal from the decision of Mr. Commissioner *Skirrow*, confirming the taxation of a bill of costs delivered by the Appellants, as accountants employed by the assignees under the bankruptcy

The scale of charges of an agent, employed by the assignees to sell the bankrupt's stock by tender, is properly settled by the rule adopted by the Court of Bankruptcy in London at an intermediate rate between that applicable to a sale by auction and that applicable to a sale by valuation.

The charges made were, "for selling by tender the bankrupt's drapery and stock in trade, showing the same when on view, checking off and delivering the same to purchasers, including all expenses of advertising, travelling and hotel expenses at *Belfast*, and for advertising, negotiating and completing a sale of the shop, fixtures, &c., which realized the net proceeds of 2,087*l.* 17*s.* 6*d.*"

The amount of the bill of costs was 82*l.* 3*s.* 11*d.*, which

It is not incumbent on the Appellate Court to decide such a question, although both parties submit to its jurisdiction.

1854.	which was made up on the principle of a sale by auction	
<i>Ex parte</i>	as follows:—	
HUNT		£ s.
and Another.	To commission on 100 <i>l.</i> at 10 <i>l.</i> per cent. .	10 0
<i>In re</i>	“ 900 <i>l.</i> at 5 <i>l.</i> do. . .	45 0
M'KENNA.	“ 1,087 <i>l.</i> 17 <i>s.</i> 6 <i>d.</i> at 2½ do. .	27 3 1
		<hr/>
		£82 3
		<hr/>

On taxation by the Registrar, this amount had been reduced to 46*l.* 6*s.* 11½*d.*, and the principle adopted by the Registrar was, that of allowing the charges as on a sale by valuation, as follows:—

	£ s.
To commission on 100 <i>l.</i> at 5 <i>l.</i> per cent. .	5 0
“ 900 <i>l.</i> at 2½ do. . .	22 10
“ 1,087 <i>l.</i> 17 <i>s.</i> 6 <i>d.</i> at 1¼ do. .	13 11 1
	<hr/>
	41 1 1
Advertising and expenses	5 5
	<hr/>
	£46 6 1
	<hr/>

The Appellants stated that the trouble and expense attendant upon a sale by tender was much greater than upon a sale by valuation, as a valuation would occur in but a few days, but that the necessity of showing the goods previously to the tenders, and subsequently checking and delivering the goods to the purchaser rendered nearly a month's residence at *Belfast* necessary; that they had caused inquiry to be made at the Court of Bankruptcy, *Basinghall Street, London*, to ascertain the allowance made by that Court for sale of stock in trade by tender, and had been informed that

the allowance made by that Court for such sale by tender was upon the following rate or scale:—

When sold by Tender—Drapery Stock.

Under 400 <i>l.</i>	4 <i>l.</i>	per cent.
Above 400 <i>l.</i> to 1,000 <i>l.</i>	3½	“
“ 1,000 <i>l.</i> to 2,000 <i>l.</i>	2½	“
“ 2,000 <i>l.</i> to 5,000 <i>l.</i>	2	“
“ 5,000 <i>l.</i> and upwards	1½	“

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Mr. Karslake supported the Petition.

[**The LORD JUSTICE KNIGHT BRUCE** inquired under what provision the Court had jurisdiction to tax such a bill as this ?]

The 83rd section of the 5 & 6 *Vict.* c. 122, provided that all bills of charges, fees and disbursements of any auctioneer, appraiser, broker, valuer or accountant employed by any assignee under any fiat for business done under such employment should be settled by the Court acting in the prosecution of the fiat. It was true that this clause was not expressly re-enacted, but the 12th section of the new act provided “ that the Court, in the exercise of its primary jurisdiction by virtue of this act, shall have superintendence and control in all matters of bankruptcy, and shall hear, determine and make order in any matter of bankruptcy whatever, so far as the assignees are concerned, relating to the disposition of the estate and effects of the bankrupt, or of any estate or effects taken under the bankruptcy, and claimed by the assignees for the benefit of the creditors, or relating to any acts done or sought to be done by the assignees in their character of assignees by virtue or under colour of the bankruptcy, and also in any matter of bankruptcy whatever as between the assignees and any creditor or

1854.

Ex parte
HUNT
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other person appearing and submitting to the jurisdiction of the Court." It is not probable that by this act it intended to abridge the authority of the Court so give the former act, and the words "other person" are sufficient to comprehend these Appellants. [*The LORD JUSTICE TURNER*.—Do they not mean persons similarly situated to creditors, that is to say, having claims against the bankrupt, or can they be supposed to refer to persons employed by the assignees?] They are to submit, large enough to extend at all events to persons employed, as these Appellants were. [*The LORD JUSTICE KNIGHT BRUCE*.—Would not such a construction render the bill of a carter, employed by the assignees, to remove part of the bankrupt's goods, subject to review in this Court?] The Respondents, the assignees, moreover desirous of having the question determined by your Lordships, and submit to the jurisdiction of the Court as they did to that of the Commissioner.

Mr. *Little* appeared for the assignees, and submitted to the jurisdiction of the Court.

Their LORDSHIPS intimated their opinion that it was not incumbent upon them to assume jurisdiction in the matter, but said that if the Appellants desired to bring the case before the Lord Chancellor, their Lords would abstain from taking any course that might prevent it.

Mr. *Karslake* said that the Appellants wished to have the opportunity of submitting the case to the Lord Chancellor.

August 5. On this day Mr. *Karslake*, with the approbation of the Lords Justices, renewed his application before the Lord Chancellor.

Mr. *Little*, for the assignees, expressed their desire to be governed by his Lordship's opinion.

1854.

Ex parte
HUNT
and Another.
In re
M'KENNA.

The LORD CHANCELLOR said that as the assignees, in substance, asked the sanction of the Court to the payment of the bill, and the Appellants consented to be bound by the order of the Court, the Court had, in one sense, jurisdiction over the matter. His Lordship then expressed his opinion that the scale of allowance ought to be the same in the country as in London. The most troublesome mode of selling was by auction, and for this the largest scale of remuneration was allowed. The least troublesome mode of sale was by valuation, and accordingly the lowest scale of charge was allowed for it.

There was an intermediate course, namely, selling by tender, and this it had been explained was considered in London as in some cases useful. In point of trouble, it was intermediate between a sale by auction and a sale by valuation, and there was an intermediate scale of charge for it accordingly. This appeared to be reasonable, and his Lordship thought the allowance ought to be according to the scale adopted by the Court of Bankruptcy in London, and that the bills in this case must be settled on that plan. The costs of this appeal must come out of the estate.



1854.



Ex parte GEORGE BIRCH TAYLOR.

Nov. 3.

Before *The*
LORDS JUSTICES.

Where an assignment of all a bankrupt's property required for his trade, as a security for an antecedent debt, has taken place more than twelve months before the petition for adjudication, *semble*, that it is material for the assignees to show, for the purpose of avoiding the deed, that there still exists a debt which existed at the time of the execution of the assignment.

In the Matter of TRYPHENA TAYLOR, a bankrupt.

THIS was an appeal from the decision of Mr. Commissioner *Balguy*, refusing to make the usual mortgagees' order upon a bill of sale executed by the bankrupt in favour of the Appellant.

The bankrupt kept an inn at *Derby*, called the "Tiger." The bill of sale was dated the 27th of *January* 1851, and made between the bankrupt of the one part, and the Appellant of the other part. It recited that the bankrupt was indebted to the Appellant in 300*l.* for money lent and advanced by the Appellant to the bankrupt, and that, being unable to pay the same, she had agreed to secure the repayment thereof, with interest, unto the Appellant by such mortgage of the personal estate and effects of the bankrupt as was thereafter expressed. By the witnessing part, the bankrupt assigned to the Appellant, his executors, administrators and assigns, all and singular the household goods and furniture, plate, linen, and china, and other effects in and upon the premises called "The Tiger," and also all and every the brewing utensils, ale, porter, wines, spirits, licences, fixtures, good-will and the full and free possession thereof, together with all and every other the personal estate and effects which then were, or which at any time during the continuance of the security should or might be, upon the said inn and premises, or in or upon any other premises which the bankrupt should or might occupy during the continuance of the security, with power immediately upon the execution of the deed, or at any time or times

times thereafter to enter upon the premises, and to hold and enjoy the same, and at his or their will and pleasure to take and carry away the said household goods and furniture, brewing utensils, good will, licences, and **all** other the chattels and effects as aforesaid, and to make **sale** of the same, either by public auction or private contract, and out of the produce thereof, after paying all expenses, to deduct the 300*l.*, with all interest that might be due thereon, and to pay the residue (if any) to the bankrupt, her executors or administrators. The deed contained a proviso making it void on payment by the bankrupt, her executors or administrators, to the Appellant, his executors, administrators or assigns, of 300*l.*, with interest at five per cent. per annum, and all costs, charges and expenses, when thereunto required, previous to any sale of any of the effects thereby assigned.

1854.

Ex parte
TAYLOR.

In re
TAYLOR.

On the 17th of *October* 1853 the Appellant, under the provisions of the deed, entered into possession.

On the 5th of *November* 1853 the adjudication took place upon a petition filed on the 5th of *November*.

By arrangement, and under an order of the Commissioner, it was ordered that the assignees should sell and dispose of the goods and chattels comprised in the deed, and that the official assignee should receive the produce thereof and hold the same as a stakeholder until the question of title should be decided between the assignees and the Appellant.

On a petition of the Appellant, seeking an order in the nature of the usual mortgagees' order, the Commissioner decided in favour of the assignees, and the mortgagee appealed.

Mr.

declaration of insolvency on the same day on which petition for adjudication was filed. The title, then depends on the validity of the deed, and of that there be no question, except upon the ground that it was an act of bankruptcy. Now, in the first place, there is nothing to show that the deed comprised substantially all the bankrupt's property. [*The LORD JUSTICE K. BRUCE*.—How could she have served a dinner, or a traveller refreshment, if the mortgagee had exercised his rights under the deed?] It is, however, unnecessary to discuss this question, for much more than six months elapsed between the execution of the bill and the petition for adjudication. The deed can therefore be treated under this adjudication as an act of bankruptcy, and must consequently be considered

They referred to *Sims v. Simpson (a)*.

Mr. Swanston for the assignees.

Although not an act of bankruptcy for the purpose of supporting an adjudication, the execution of the deed may be an act of bankruptcy for the purpose of rendering that deed a fraud on the creditors, and as such we do not found the title of the assignees on the principle of relation. Assuming that their right accrued on the

[*The LORD JUSTICE KNIGHT BRUCE*.—Can you set it **aside** on that ground without showing that there is a **creditor** entitled to prove under the adjudication, to whom **the** bankrupt was indebted at the time of the execution **of** the deed? In *Ex parte Bailey* (a) did I found my **judgment** on the question whether the deed was an act of **bankruptcy** or not?]

1854.

Ex parte
TAYLOR.

In re
TAYLOR.

It has never been held necessary to show that a debt **existing** at the time has continued in existence till the **bankruptcy**. An intention to defeat creditors generally **is** sufficient to invalidate a deed.

Their LORDSHIPS intimated that it might be material **to** show the continued existence of a debt due at the time **of** execution of the deed.

On the application of the assignees, the case stood over for that purpose, and has not, it is believed, been since mentioned.

(a) 3 *De G. Mac. & Gor.* 534.

1854.

*Ex parte* EPHRAIM WATSON.

Nov. 3.

Before *The*
LORDS JUSTICES.

Where the petitioning creditor had, before petitioning for adjudication, arrested the bankrupt for the petitioning creditor's debt, and detained him in custody till he was discharged on his petition to the Insolvent Debtors Court, the Court of Appeal refused to annul the adjudication on that ground, until its validity had been tried at law.

In the Matter of EPHRAIM WATSON, a Bankrupt.

THIS was the petition of the bankrupt to annul the adjudication, on the ground that the petitioning creditor had taken him in execution and kept him in prison till he was discharged under the Act for Relief of Insolvent Debtors.

The petition stated, that in *November* 1853, Mr. *Isaac Humphrey*, one of the Respondents, commenced an action against the Appellant in the Court of Exchequer to recover damages in respect of the removal of a stack of straw, and obtained a verdict for 14*l.* damages, and the costs of the action, which were afterwards taxed at the sum of 81*l.* 1*s.* 8*d.*; that on the 5th of *May* 1854 the Appellant was arrested on a writ of *capias* for 95*l.* 1*s.* 8*d.*, at the suit of Mr. *Humphrey*, and committed to prison, where he remained at the suit of Mr. *Humphrey* for the above debt until discharged as thereafter mentioned; that on the 13th of *May* 1854 the Appellant filed his petition in the Court for the Relief of Insolvent Debtors, praying for relief, and in his schedule, among the names of his other creditors, inserted the name and address, and also the debt due from the Appellant to Mr. *Humphrey*; that the petition came on for hearing on the 26th of *June* 1854, when the Respondent Mr. *Humphrey* appeared and opposed the discharge of the Appellant, but that, after hearing Mr. *Humphrey* and his attorney, the Court declared the Appellant to be entitled to his discharge, and the Appellant was discharged; that on the 14th of *July* 1854 Mr. *Humphrey* presented a petition

a petition to the Court of Bankruptcy, praying for adjudication of bankruptcy against the Appellant, and that on the 14th of July 1854 the Appellant was thereunder adjudicated a bankrupt, and Mr. *Humphrey* was appointed creditors' assignee.

1854.

Ex parte
WATSON.

In re
WATSON.

Mr. *Flather*, in support of the petition, cited *Cohen v. Cunningham* (a).

Mr. *W. M. James*, for the Respondents, the assignees.

Where the debtor has been discharged under the Insolvent Debtors Acts, the execution has never been held a satisfaction of the debt. It is true that if a creditor has the debtor in execution, he must discharge the debtor before proving. But how could he prove if an execution from which the debtor was discharged operated as a complete satisfaction?

He referred to *Nadin v. Battie* (b); *Baker v. Ridgway* (c); *Merchant v. Frankis* (d).

Mr. *Flather* in reply.

The LORD JUSTICE KNIGHT BRUCE.

It is not *ex debito justitiæ* to annul an adjudication even when plainly bad in law. In the circumstances of this case, without giving an opinion on the question of law, we think that the petition should stand over, with liberty to the Petitioner to bring such action as he may be advised.

Ordered accordingly.

(a) 8 T. R. 123.

(b) 5 East, 147.

(c) 2 Bingh. 41.

(d) 3 Q. B. 1.

1854.

*Ex parte* NICHOLAS FORD.

In the Matter of CHRISTOPHER SAMUEL FLO
AND HARRY BUCKLAND LOTT, Bankrupts

Dec. 8.

Before The
LORDS JUSTICES.

The sale of the bankrupt's estate is a matter peculiarly within the discretion of the Commissioner, with which the Court of Appeal will not interfere upon a mere doubt.

Semble, that the limitation of the time for appealing is not confined to decisions on adverse claims, but extends to administrative orders or directions.

THIS was a petition of one of the trade assignees seeking to set aside a sale of part of the bankrupt estate which had been made by the other assignees, the approbation of the Commissioner.

The bankrupts were bankers at *Honiton*, and following was the substance of the petition, and of the affidavit in support of it.

Part of the bankrupt's estate consisted of a debt of 6,637*l.* 14*s.* 8*d.*, the payment of which was secured to the bankrupts by a second mortgage of some estates at *Bromcombe*. In *May* 1853 a Mr. *Lott*, who had been a confidential clerk of the bankrupts, contracted with the bankrupts as official assignee for the purchase of the debt for 7,000*l.* subject to the approval of the Court and of the creditors' assignees. The assignees however declined to give their approval. In *February* 1854 a Mr. *Tucker* made an offer of 1,000*l.* for the debt, whereupon at a meeting in the bankruptcy before the Commissioner, Mr. *Tucker* also offered the same sum. Mr. *Tucker* then suggested that the debt should be offered for sale by auction. The Commissioner recommended that the offer of Mr. *Lott* should be accepted. On the 8th of *March* 1854 Mr. *Lott* offered 1,050*l.* and Mr. *Tucker* 1,070*l.* On the 14th of *March* 1854 another meeting was held before the Commissioner, who ordered the assignees to sell the debt for 1,050*l.* to Mr. *Lott*. The Appellant then

upon declined to concur in the sale, and alleged as the **reason** of his refusal that Mr. *Tucker* had offered, and **was** willing to pay, 1,070*l.* and that no suggestion was **made** by any one that Mr. *Tucker* would not be able to **complete** the purchase. On the 19th of *April* 1854 the **Commissioner** signed his order in writing whereby, after **reciting** that on the 8th of *March* then last the **Commissioner** had ordered the debt to be sold, and that on that **19th** of *April* the official assignee had represented that **Mr. Lott** had offered 1,050*l.*, and that the official assignee **and James Basleigh**, one of the creditors' assignees, were **willing** to accept such offer, and that it appeared to the **Commissioner** that the offer was advantageous, and ought **to be accepted**, it was ordered that the assignees of the **estate** and effects of the bankrupts should accept the **offer**, and that upon payment of the sum of 1,050*l.* to the official assignee, the assignees should assign the debt **to Mr. Lott.**

1854.

Ex parte
FORD.

In re
FLOOD
and Another.

The petition and affidavit further stated, that on the 28th of *April* 1854 Mr. *Tucker* offered to the assignees 1,200*l.* for the purchase of the debt, and that at that time Mr. *Lott* had made default in payment of the price agreed to be paid by him, and that he did not in fact pay his purchase-money till the 30th of *August* following. A summons was issued against the Appellant, dated the 27th of *August* 1854, to appear before the Commissioner on the 30th of that month, and show cause why the Appellant should not obey the order of the 19th of *April*. The Appellant declined to execute the assignment to Mr. *Lott*, alleging that the price paid by Mr. *Lott* was not sufficient. The Commissioner thereupon required the assignees to execute the deed, and the Appellant still declined to execute it. The Commissioner then signed a warrant for the Appellant's committal, whereupon the Appellant,

1854.

Ex parte
FORD.

In re
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and Another.

Appellant, protesting against the legality of the warrant executed the deed to avoid imprisonment.

The prayer of the petition was, that the order of the 19th of April 1854, and the warrant, might be set aside and that the official assignee might be ordered to repay the sum of 1,050*l.* to Mr. *Lott*, and that the deed of assignment made to Mr. *Lott* might be set aside, and declared null and void, and that the same might be delivered up to the Appellant or to the bankrupt's assignees to be cancelled, and that the mortgage debt and securities for the same might be sold by public auction to the highest bidder.

Mr. *Swanston* and Mr. *Shapter*, were for the Petitioner.

Mr. *W. M. James*, for the other assignees, objected that the time for appealing had expired before the petition was filed.

Mr. *Swanston* and Mr. *Shapter*, for the Petitioner.

This is not an appeal from a decision or order within the meaning of the portion of the twelfth section, limiting the time for an appeal. The clause provides that the Court shall hear and determine and make order in any matter of bankruptcy whatever, &c., and provides that no appeal shall be entered within twenty-one days from the date of any decision or order of the Court, such decision or order shall be final. These words obviously mean an order following a decision on adverse claims and not a mere administrative direction. Decision implies a contest. It would be very unjust if it were otherwise for administrative directions are frequently given on ex parte applications, and the party complaining of the same may not (as was the case here) have been present when the

the objectionable order was made, and may not hear of **it** within the twenty-one days. With respect to the **merits**, no good reason was or can be given for preferring **the** less advantageous offer.

1854.

Ex parte
FORD.

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and Another.

Mr. *W. M. James*, for the other assignees, was stopped by the Court.

The LORD JUSTICE KNIGHT BRUCE.

This petition is not merely frivolous and absurd, it is vexatious and oppressive. The sale of the bankrupt's property is a matter peculiarly within the discretion of the Commissioner who has the duty of superintending the conduct of the assignees in it. My impression is, that the Commissioner in this case rightly exercised the discretion reposed in him by accepting the price offered by Mr. *Lott*; but had I doubted on this point, I should not have thought it right to interfere with the discretion of the Commissioner as to such a point, on a mere doubt, especially when a sum exceeding 1,000*l.* has been paid for a questionable doubtful debt, which is not alleged to be worth more than 1,200*l.*, and when the application is, that a sum of 1,050*l.*, which has been paid, may be returned for the chance of obtaining 150*l.* more, which may never be obtained. With respect to the warrant of commitment, I do not think it necessary to give any opinion whether it was regular or not, for no inconvenience has been sustained by reason of it, nor can any now be sustained, since the Appellant has wisely done the act of which it was intended to enforce the performance. Therefore, independently of the question of time, as to which I give no opinion, the petition must, I think, be dismissed with costs.

The LORD JUSTICE TURNER.

The plain meaning of this petition is, that the Peti-

1854.

Ex parte
FORD.*In re*
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and Another.

tioner is setting up his judgment against that of his co-assignees, and (what is more important) that of the Commissioner. I see no ground for thinking that the Commissioner has miscarried in the exercise of his discretion. It is unnecessary, therefore, to give an opinion on the question, whether the Petitioner is not concluded by the time which has elapsed since the order complained of was made. On this point it has been argued, that an order within the provision as to appealing must be one consequent on a decision respecting adverse claims, and not an order made for the administration of the estate only; but the 14th section of the act, providing that all appeals from decisions or orders of the Commissioner shall be brought on by petition, motion or special case, is perfectly general, and indeed, according to the best judgment which I can form, this case comes strictly within the letter of the 12th section itself.

Appeal dismissed with costs.

1855.

Ex parte BARCLAY and Others.

In the Matter of SAMUEL GAWAN, a Bankrupt.

Nov. 12, 14,
23.

THIS was a Petition in bankruptcy, presented by Messrs. *Barclay Perkins & Co.*, Brewers, appealing against a decision of Mr. Commissioner *Fane*: the owing were the facts of the case.

Before The
Lord Chan-
cellor, LORD
CRANWORTH,
and The
LORDS Jus-
TICES.

The Bankrupt, *Samuel Gawan* of the *Crown Public-house Kent Street Southwark* in the County of *Surrey*, used victualler, being indebted to the Petitioners, visited with them on the 10th *April* 1854, as a surety, the lease of the *Crown* Public-house and other premises dated the 12th *February* 1851, accompanied a Memorandum dated the 10th *April* 1854 and signed the Bankrupt by which he acknowledged that the deposit had been made to the intent that the Petitioners might become and remain equitable mortgagees of the lease and of the premises thereby demised, and of the fixtures and appurtenances to the premises belonging, and of the goodwill of the business carried on at the *house* aforesaid, for securing to them the repayment of a sum then due and such other sums as should become due not exceeding with the debt the sum of 2,000*l.*; and the Bankrupt thereby declared that the lease or the pre-

A. B. a publican being indebted to *C. D.* deposited with him the lease of a public-house and other houses accompanied by a memorandum expressly constituting *C. D.* equitable mortgagee of the leasehold premises and of the fixtures to the premises belonging: *A. B.* remained in possession of the premises and became bankrupt:—
Held, reversing the decision of the Commissioner in Bankruptcy,

that the fixtures, consisting of ordinary house fixtures and trade fixtures, were not in the order and disposition of the bankrupt within the 125th section of the Bankrupt Consolidation Act 1849, but belonged to the mortgagee.

By the word "fixtures," the Court understood such things as are ordinarily affixed to the freehold for the convenience of the occupier and which might be removed without material injury to the freehold and the removal of which by a tenant would give a ground of action to the landlord. The authorities on the subject reviewed.

Practice as to costs of equitable mortgagee's petition for sale.

Vol. V.

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1855.

Ex parte
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 and Others.
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GAWAN.

mises thereby demised or the goodwill of the business should not be redeemed or redeemable by him his executors administrators or assigns until the whole of the sums and interest thereby intended to be secured should be fully paid off and satisfied; and that he should thereby undertake and agree on demand and at his own costs to execute unto the Petitioners or the surviving survivor of them a mortgage by demise or otherwise of the premises with power of sale for the purposes therein said.

S. Gawan became bankrupt, and at the time of his bankruptcy there was due to the Petitioners £1,590*l.* 18*s.* 2*d.*, and no mortgage of the premises had then been executed. Messrs. *Barclay & Co.* then presented a Petition to the Commissioner in Bankruptcy praying that it might be declared that the Petitioners were entitled to a lien upon the lease of the premises *February* 1841 and upon the premises thereby demised and upon all the fixtures and articles in the nature of fixtures then being on the premises demised or thereunto belonging, and that an account might be taken of what was due in respect of the deposit, and the lease of the 12th *February* 1841 and the premises thereby demised, and all the fixtures and articles in the nature of fixtures then being on the premises demised or thereunto belonging, might be ordered sold, and that the assignees of the bankrupt and all necessary parties might be ordered to join in and execute all necessary acts and deeds for effectuating the sale, and that the money arising from the sale, payment of the costs attending the same and on application, might be applied in or towards satisfaction of what, upon taking the account, should be found due to the Petitioners, and that the Petitioners might be at liberty to prove so much of what should be found

to them upon the account as should not be satisfied by the proceeds of the sale, and that the Petitioners might be permitted to bid at the sale.

The Petition came on before Mr. Commissioner *Fane* on the 5th September 1855, when the learned Commissioner made an order declaring that Messrs. *Barclay* were equitable mortgagees of the leasehold messuages and premises, and finding that there was due to them in respect of their security the sum of 1590*l.* 18*s.* 2*d.*, and directing that the leasehold premises, with all the fixtures and articles in the nature of fixtures thereon, should be sold, and that the monies arising by the sale of the leasehold messuages and premises should be applied, after deducting certain payments for costs &c., in payment of the mortgage debt, and that the surplus (if any) arising from the sale of the leasehold messuages, and the proceeds of the fixtures, should be paid over to the assignees.

Messrs. *Barclay* appealed from so much of the order as directed the proceeds of the fixtures to be paid over to the assignees, and asked that the said proceeds might be declared to be liable, together with the proceeds of the leasehold premises, to the payment of what was due to them.

The fixtures in question consisted of two descriptions, first, house fixtures to the value of 26*l.*, and, secondly, trade fixtures in upon and about the Public-house to the value of 90*l.*

The case came on in the first instance on the 10th November 1855, before the Lords Justices, but at the suggestion of their Lordships, and with the sanction of the Lord Chancellor, it was directed to be argued before the full Court of Appeal by one Counsel on each side.

Mr. *Bilton*, with whom was Mr. *Hoffman*, for the Assignees, supported the judgment of the Commissioner.

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1855.

Ex parte
BARCLAY
and Others.

In re
GAWAN.

1855.

Ex parte
BARCLAY
 and Others.
In re
GAWAN.

He argued that the case must be determined by authority, and that though there was some difference between the various decisions which had taken place on the point, the balance of authority was in favour of the view taken by the learned Commissioner, which had the sanction of Mr. Commissioner *Fonblanque* and Mr. Commissioner *Goulburn*. He cited *Lingham v. Biggs* (a), *Bryson v. Wylie* (b), *Ex parte Reynal* (c), *Hellawell v. Eastwood* (d); and expressly relied on the judgment of Lord *Lyndhurst* in *Trappes v. Harter* (e): he also cited *Re Wood* before Mr. Commissioner *Fonblanque* (f) in whose judgment in which Mr. Commissioner *Goulburn* concurred, and *Ex parte Langton* before Mr. Commissioner *Fane* (g).

Mr. *Malins*, with whom was Mr. *Elderton*, for the Appellants.

He submitted that an examination of the authorities at common law, in equity, and in bankruptcy, would show that the point now raised was settled, and had so been for a long time; and that the Commissioners ought to have treated it as a matter no longer open to question. He then referred to the following cases decided at common law; *Horn v. Baker* (h), *Colegrave v. Dias Santos* (i), *Lyde v. Russell* (k), *Clark v. Crownshaw* (l), *Coombs v. Beaumont* (m), *Hare v. Horton* (n), *Trappes v. Harter* (e), *Boydell v. M'Michael* (o), *Longstaff v. Meagoe* (p), *Hitchman v. Walton* (q), *Hellawell v. Eastwood*.

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| (a) 1 Bos. & Pul. 82. | (h) 9 East, 215. |
| (b) 1 Bos. & Pul. 83, n. | (i) 2 B. & C. 76. |
| (c) 2 Mont. D. & De Ger, 443. | (k) 1 B. & Ad. 394. |
| (d) 6 Exch. Rep. 295. | (l) 3 B. & Ad. 804. |
| (e) 2 Crompt. & M. 153. | (m) 5 B. & Ad. 72. |
| (f) 1 Bankruptcy and Insolvency Reports, 70, n. | (n) 5 B. & Ad. 715. |
| (g) 1 Bankruptcy and Insolvency Reports, 241. | (o) 1 C. M. & R. 177. |
| | (p) 2 A. & E. 167. |
| | (q) 4 M. & W. 409. |

wood(a); and remarked that of these *Boydell v. M^r Michael* was exactly the present case, and that *Hellawell v. Eastwood* had no bearing on the question, not being a case of order and disposition, but of what goods might be distrained for rent. He then cited and commented on the following cases in equity and bankruptcy; *Rufford v. Bishop* (b), *Hubbard v. Bagshaw* (c), *Ex parte Austin* (d), *Ex parte Loyd* (e), *Ex parte Wilson* (f), *Ex parte Belcher* (g), *Ex parte Broadwood* (h), *Ex parte Reynal* (i), *Ex parte Bentley* (k), *Ex parte Cotton* (l), *Ex parte Tagart* (m), *Ex parte Sykes* (n); and remarked that the only authority which could aid the Respondents was *Ex parte Austin*, which was not in fact a decision, but merely the expression of opinion by Sir George Rose, which opinion it was submitted was quite overruled by subsequent decisions.

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(a) 6 *Erch. Rep.* 295.
 (b) 5 *Russ.* 346.
 (c) 4 *Sim.* 326.
 (d) 4 *D. & Ch.* 207.
 (e) 3 *D. & Ch.* 765.
 (f) 2 *Mont. & A.* 61.
 (g) 2 *Mont. & A.* 160. On this case being cited, some remarks were made on the terms in which the Chief Judge is represented in the report of his judgment to state his difference of opinion from the judges who decided *Boydell v. M^r Michael*; and a reference was then made to the report in the *Law Journal*, Vol. IV. (N.S.) *Bank.* 29, to show that his Honor was alluding to his opinion previous to the decision of *Boydell v. M^r Michael*. See however the case as reported 1 *Deacon & Chitty*, 703, p. 716.
 (h) 1 *Mont. D. & De Gex*, 631.

(i) 2 *Mont. D. & De Gex*, 443.
 (k) 2 *Mont. D. & De Gex*, 591.
 (l) 2 *Mont. D. & De Gex*, 725.
 (m) 1 *De Gex*, 531.
 (n) 18 *Law J. (N. S.) Bank.* 16; 13 *Jur.* 486. The Court having sent for the original petition in this case, the Lord Chancellor said that it was not a case of the mortgage of a leasehold house and fixtures, but of a bill of sale of fixtures independent of the house. According to the note which one of the present Reporters took of the case, nothing was decided except that the claim of the Petitioner was too doubtful to entitle him to the common mortgagee's order in Bankruptcy. The Vice-Chancellor offered him an opportunity of filing a bill, which his counsel declined.

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 of Mr. *Malins'* argument, referred to *Wilde v. Waters*
 and *Bishop v. Elliott (b).*]
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GAWAN. Mr. *Bilton* replied.

Nov. 23. The LORD CHANCELLOR.

This was an appeal against a decision of one of Commissioners in Bankruptcy, dismissing the Petition of Messrs. *Barclay* the Brewers, who claimed to have charge upon the fixtures in certain houses which had been mortgaged to them.

The Bankrupt, a Publican, was the occupier of a Public-house, and had a leasehold interest in that and four other houses; in the Public-house and the other houses there were what are ordinarily termed fixtures, that is, articles which are fixed to a dwelling-house for the convenience of the occupier, and which probably as between heir and executor would pass to the heir, unless they were fixtures to which the modern doctrine would apply that the tenant might remove them during the term. The Petitioners being mortgagees of the houses, contend that they are mortgagees of the fixtures also, and consequently that they were entitled to the produce of the whole including fixtures. On the other hand the Commissioner held that the fixtures, the Bankrupt being in possession of the house he had mortgaged, must be considered as goods of another in the order and disposition of the Bankrupt as the reputed owner, and that therefore the produce of those fixtures was to go to the general creditors,

(a) 19 Jur. 1021.

(b) 19 Jur. 962.

not to the Messrs. *Barclay* the Petitioners; and from that decision the present appeal was presented.

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The question arises under the hundred and twenty-fifth clause of the Bankrupt Law Consolidation Act 1849, there not having been an exactly similar provision with reference to all that is in question in this case in the preceding Acts. This section enacts, "That if any bankrupt at the time he becomes bankrupt shall by the consent and permission of the true owner thereof, have in his possession, order or disposition any goods or chattels whereof he was reputed owner, or whereof he had taken upon him the sale, alteration or disposition as owner, the Court shall have power to order the same to be sold and disposed of for the benefit of the creditors under the bankruptcy;" and then follow certain provisoes which do not apply to the case. Under the former Acts the enactment was, not that the Court should have power to order the goods to be sold, but that they should pass at once to the assignees, but it was the same as to what constituted goods in the order and disposition of the bankrupt. The object of the clause clearly was to prevent persons from enabling traders to obtain credit from an appearance of wealth which was not real. This has been often alluded to, and the cases are very clearly stated by Lord *Redesdale* in *Joy v. Campbell* (a), which is quoted in Mr. *Shelford's* very valuable little book, *On the Law of Bankruptcy*, page 173. Lord *Redesdale* says, "That clause refers to chattels in the possession of the bankrupt, 'in his order and disposition with consent of the true owner,' that means where the possession, order and disposition is in a person who is not the owner, to whom they do not properly belong, and who ought not to have them, but whom the owner permits unconscientiously, as the Act supposes, to have such order

(a) 1 Sch. & Lef. 336.

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order and disposition." The clause therefore does not apply to cases where the possession is in the ordinary course of business, and where it cannot reasonably induce persons to give credit. On this principle was decided the recent case of *Whitfield v. Brand* (a), where the Court held that books left in the hands of a bookseller, to be sold by him in the ordinary course of trade, did not pass to his assignees, it being notorious that books are left with publishers or others in large quantities, to be sold on account of the person who leaves them. The same principle is laid down in *Mare v. Cadell* (b), decided by Lord Mansfield. Here the question is as to fixtures, trade fixtures, and what I may call domestic fixtures, and I wish to state that by "fixtures" we, for the Lords Justices and myself take the same view of the case, understand such things as are ordinarily affixed to the freehold for the convenience of the occupier, and which may be removed without material injury to the freehold, such will be machinery, using a generic term, and, in houses, grates, cupboards and other like things.

The law has from early times held, that in many cases such things, when put or fixed by the tenant, may on certain conditions be removed by him without giving any ground of complaint to the landlord; and we will assume that to be the case as to the fixtures now in dispute. Of course, if these were not fixtures coming under that description, all question would be at an end, and we assume, for the purpose of this argument, that these are fixtures which might be removed by the tenant without giving any ground of action to the landlord. Still, so long as the term subsists, they have no existence separate from the soil or building to which they are annexed, and in case of bankruptcy the right to remove them which

(a) 16 M. & W. 282.

(b) *Cooper*, 232.

Which belongs to the tenant would pass to his assignees, and they would have against the landlord the same right as the bankrupt himself had. If, however, the bankrupt as previously to his bankruptcy parted with the house or building, he has, *prima facie* at least, parted with the fixtures. This was the principle upon which the Court of Queen's Bench acted in *Colegrave v. Dias Santos (a)*, in 1834, and it can make no difference whether the conveyance is absolute or only by way of mortgage. Here the conveyance, I should rather say assignment, was made by way of mortgage, and it is clear that if there had been no bankruptcy, the Petitioners would have been entitled to the fixtures; they were treated as part of the houses assigned, and not as having any separate existence. The assignment having been by way of mortgage only, the bankrupt retained possession of the house as is usual in similar transactions, and of course of the fixtures. The question then is, whether this is a possession and reputed ownership within the meaning of the clause of the Statute.

I will consider the case, first, as if it were untouched by any previous decision. The object of the clause in question is to prevent fictitious credit by an appearance of wealth, but it is scarcely possible to suppose that credit is ever really given upon the faith of fixtures as distinguished from a house. The Statute, it is admitted, does not apply to the house, and the creditor is bound to take notice that the house is or may be mortgaged to another; and if the house is mortgaged, the presumption is that all is mortgaged which would pass under the conveyance of the house. If indeed the mortgage does not expressly or impliedly include the fixtures, then, supposing them to be fixtures which the tenant has a right

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(a) 2 B. & C. 76.

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as between himself and his landlord to remove, they will belong to the assignees, not under the order and disposition clause, but because they were the property of the bankrupt; this was the case of *Troppe v. Harter* (a). If, however, the bankrupt has by his mortgage parted with his property in the fixtures, his subsequent possession is not a possession of them as goods and chattels, but as part of the house. This would be my clear opinion of the case, and I believe that of my learned brethren also, had the question now to be decided for the first time. In truth, the whole provision is one little adapted to the actual state of society, even if it is applied to the case of stock in a shop, for credit I believe is given, generally at least, not upon such appearances, but upon the character of the person trusted. I disclaim, however, for myself, and I believe for my learned brethren also, any such principle of decision. If the case were *res integra*, we should be bound to decide it according to the language of the Statute, interpreting that language of course so as fairly to carry its object into effect; and acting upon that, I should have no hesitation, for the reasons already adverted to, in saying that even if there were no previous decision to guide us, these fixtures were not goods and chattels in the possession of the bankrupt within the meaning of the Statute.

Not only, however, is the case not *res integra*, but the question has for nearly half a century been considered in *Westminster Hall* as perfectly settled. It was fully discussed in *Horn v. Baker* (b), and the judgment of the Court was there distinct and unanimous; and to that decision the Court of Queen's Bench adhered in *Clark v. Crownshaw* (c) in 1832, and in *Coombs v. Beaumont* (d),
in

(a) 2 *Crompt. & M.* 179.(b) 9 *East*, 215.(c) 3 *B. & Ad.* 804.(d) 5 *B. & Ad.* 72.

in 1833. In these cases the authority of *Horn v. Baker* **was** treated as conclusive, as also by the Court of Exchequer in *Boydell v. M'Michael* (a) in 1834. In this Court too, Sir John Leach, in *Rufford v. Bishop* (b) in 1829, and Sir Lancelot Shadwell, in *Hubbard v. Bagshaw* (c) in 1831, took the same course. Indeed, I am not aware, nor are my learned brethren, of a single case in *Westminster Hall* where the doctrine of *Horn v. Baker* has been departed from. It is true that in *Trappes v. Harter* (d) some expressions fell from Lord Lyndhurst which are supposed to have been at variance with the principle on which the cases have proceeded, although he does not in terms question their soundness. The decision in *Trappes v. Harter* was clearly right, that is it was right if the Court came to the conclusion stated at the bottom of page 181 of the report, that the machinery in question did not pass by the mortgage, but that it was the property of the bankrupts at the time of the bankruptcy and so passed to their assignees. What, however, is relied on for the Respondents, is the language of Lord Lyndhurst in his judgment at the bottom of page 180 of the report, where he is represented to have used these words, "The machinery in this case appears to have been in the reputed ownership of the bankrupts, and they obtained credit by reason of their possession of it, and we are of opinion that it formed part of the partnership estate, and passed to the assignees as such." This, it was argued, showed that Lord Lyndhurst, or rather the Court of Exchequer, considered the fixtures to be in the possession order and disposition of the bankrupts independent of their title as owners, but this is not the fair explanation of the language used, which must be looked to with reference to the facts which were found by the special case upon

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(a) 1 C. M. & R. 177.

(b) 5 Russ. 346.

(c) 4 Sim. 326.

(d) 2 Crompt. & M. 153.

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upon which the Court was to pronounce judgment. Among the facts so found, I observe that it is stated at the bottom of page 159 of the report, that "they," that is the bankrupts, "had all the machinery in their possession order and disposition, and were the reputed owners thereof." It was no doubt with reference to the facts so found, that the observation in question was made, though I must remark that the finding itself is calculated to mislead. It was most probably true that the bankrupts were the reputed owners, for, according to the facts found, they were the real owners; and, supposing this was generally known, they would naturally be the reputed owners. The Statute, however, does not apply to the case of a bankrupt in possession of his own goods; it is confined to the case of a person in possession of the goods of another.

This principle, which I may observe is clearly stated by Lord *Redesdale*, was forcibly illustrated by a case in the Court of Exchequer of *Load v. Green* (a). That was a case of this sort: the bankrupt had shortly previous to his bankruptcy fraudulently purchased certain goods, the particulars of the fraud it is not necessary to state, but he had so purchased them that the vendor might on principles of law, if he had thought fit, have repudiated the sale and reclaimed the goods; before he had done so the bankruptcy took place, and the question then was, the vendor having discovered the fraud and interfered by claiming the goods, whether he could do so, and it was contended that they had clearly passed to the assignees, for that if they were not the bankrupt's own goods, they were in his order and disposition as reputed owner. Certainly, at the first blush, that is very much the impression that would strike any person, but the Court

(a) 15 M. & W. 216.

of Exchequer, after great deliberation, came to the conclusion that the Statute did not apply. The judgment was delivered by Mr. Baron *Parke*, and is to be found at page 222 of the Report, and as it contains I think valuable observations as applicable to the present case, I will shortly state it, as the case was not I believe referred to at the bar;—"Not being bound, therefore, by decision, we must consider whether this case is within the 21 Jac. 1. The meaning of this Statute is well explained by Lord *Redesdale* in *Joy v. Campbell*, 1 Sch. & Lef. 336, in construing the analogous Irish Act. His Lordship says that 'it refers to chattels where the possession order and disposition is in a person who is not the owner, to whom they do not properly belong, who ought not to have them, but whom the owner permits unconscientiously, as the Act supposes, to have such order and disposition.'—"The object was to prevent deceit by a trader, from the visible possession of property to which he was not entitled; but in the construction of the Act the nature of the possession has always been considered, and the words have been construed to mean possession of the goods of another with the consent of the true owner.' In order, therefore, to bring the case within the Statute, there must be a real owner distinct from an apparent owner, and the real owner must consent to the apparent ownership as such; but in this case the Plaintiffs never did consent to the apparent ownership as such; they never contemplated the permitting the bankrupt to obtain a credit by means of the possession and apparent ownership of property which really did not belong to him. They intended to part with the property itself, and to divest themselves altogether of all right of it; and although, in consequence of the bankrupt's fraud upon them, they had a right to annul the contract and be again the real owners, that right they did not exercise till after the bankruptcy; and, consequently, at the time of the

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the act of bankruptcy, upon which the title of assignees depends, the bankrupt was not apparent owner, but real owner, and the Statute does not apply." It is impossible to find a case which more strongly illustrates the doctrine under consideration.

I have thought it right to make these observations in consequence of what fell from Lord *Lyndhurst* extrajudicially, and which I believe had reference solely to the facts found in the case with which alone the Court had to deal. Be that, however, as it may, the decision clearly proceeded on another ground; and though *Trappes v. Harter* was cited in the subsequent case of *Boydell v. M^r Michael*, the Court of Exchequer considered the authority of *Horn v. Baker* to be altogether unshaken.

Such being the clear and uniform course of decision in *Westminster Hall*, it is matter of regret that the learned Commissioner of Bankrupt should have considered the point as one open for discussion. When a construction has once been deliberately put on the language of a Statute, it is with great hesitation and reluctance that any Court, not acting as a Court of Appeal, construes the same language differently. The administration of the estates of bankrupts, according to the provisions of the Bankrupt Laws, is placed exclusively in the hands of the Commissioners of Bankrupt, subject to certain rights of appeal: but the construction of the Statutes, as to what does or does not constitute the property to be administered, is a duty necessarily vested in the superior Courts of *Westminster Hall*, to which the Commissioners are bound to defer. In the case before us, assuming as I do that the fixtures, trade and others, are such as passed by the mortgage to Messrs. *Barclay*, it is clear on authority that they have a good title against the Assignees, and are entitled to the relief they ask.

The

The LORDS JUSTICES concurred.

Some discussion then took place on the question of the costs both of the Appeal, and of the Petition for sale to the Commissioners.

Mr. *Malins* stated that the general practice of the Commissioners was to make an equitable mortgagee pay the costs of his petition for sale, whether he was equitable mortgagee by mere deposit of deeds, or by a deposit accompanied by a memorandum.

Their LORDSHIPS, advertng to the distinction which formerly existed, namely that an equitable mortgagee by a mere deposit paid the costs of the petition, but that a memorandum entitled him to his costs out of the proceeds of the sale of the mortgage, expressed an opinion that the present practice as stated to them was not correct, and, in reference to the case before the Court, ordered the Petitioners' costs of the appeal to be paid out of the estate, and all other costs to be added to their security.

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Ex parte SAMUEL WILKES.

In the Matter of SAMUEL WILKES, a Trader within the meaning of the Laws in force concerning Bankrupts, and of the Deed of Arrangement between him and his creditors.

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A deed of inspektorship, containing a covenant by a debtor for payment of his debts in full by instalments, and a covenant on the part of the creditors executing the deed not to sue in the meantime, but not providing, except in certain events, for the assignment of all the debtor's estate,—*Held*, not to be a deed of arrangement within the provisions of the Bankrupt Law Consolidation Act respecting arrangements by deed.

Before certifying that a deed has been executed by the majority required by those provisions, the Commissioner ought to be satisfied that the deed is one within the scope of them.

THIS was the appeal of *Samuel Wilkes* from the decision of Mr. Commissioner *Balguy*, refusing to grant to the Appellant an order or certificate under the 225th section (a) of the Bankrupt Law Consolidation

(a) This section, and those in connection with which the Court held that it must be construed, are as follows :—

224. " That every deed or memorandum of arrangement now or hereafter entered into between any such trader and his creditors, and signed by or on behalf of six-sevenths in number and value of those creditors whose debts amount to ten pounds and upwards, touching such trader's liabilities, and his release therefrom, and the distribution, inspection, conduct, management and mode of winding-up of his estate, or all or any of such matters, or any matters having reference thereto, shall (subject to the conditions hereinafter mentioned) be as effectual and obligatory in all respects upon all the creditors who shall not have signed such deed or memorandum of arrangement as if they had duly signed the same; and such deed or memorandum, when so signed, shall not be or be liable to be disturbed or impeached by reason of any prior or subsequent act of bankruptcy: provided always, that every creditor shall be accounted a creditor in value in respect of such amount only as upon an account fairly stated, after allowing the value of mortgaged property and other such available securities or liens from such trader, shall appear to be the balance due to him."

225. " That no such deed or memorandum of arrangement shall be effectual or obligatory upon any creditor who shall not have signed the same, until after the expiration of three months from the time at

solidation Act, 1849, certifying that a deed of arrangement had been executed by six-sevenths of the Appellant's creditors.

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which such creditor shall have had notice from such trader of his suspension of payment, and of such deed or memorandum of arrangement, unless such trader shall within such time obtain from the Court an order or certificate of the said Court declaring or certifying that such deed or memorandum of arrangement has been duly signed by or on behalf of such majority of the creditors as aforesaid; and it shall be lawful for the Court within the district of which the trader shall have resided or carried on business for six months next immediately preceding his suspension of payment to make such order or certificate on the petition of any such trader, and to exercise jurisdiction in and over the matters of any such application; and no creditor who shall not have had fourteen days notice of any intended application for such order or certificate as aforesaid shall be bound thereby."

226. "That when the trustee or inspector under any such deed or memorandum of arrangement, or if there shall be no such trustee or inspector, when any two of the creditors shall be satisfied that six-sevenths in number and value of the creditors whose debts amount to ten pounds and upwards have signed such deed or memorandum, it shall be lawful for such trustee or inspector, or for such two creditors, as the case may be, to certify the same to the Court in writing, and such certificate shall be filed with the Registrar of the Court, and shall thereupon be *prima facie* evidence in all Courts of law and equity that such deed or memorandum of arrangement has been so signed."

227. "That every such certificate as last aforesaid shall have appended thereto a full account of the debts of such trader, together with the names, residences and occupations of his creditors, and shall be accompanied by an affidavit by such trader verifying the same; and any omission in such account, or the insertion therein of any debt not really existing, or of any larger amount of debt than that really existing, and which shall appear to the Court to have been made through the culpable negligence or fraud of such trader, with intent to defraud any of his creditors, shall deprive him of the benefit of the provisions of this act with respect to arrangements by deed, and of the discharge proposed in any such deed or memorandum of arrangement: provided always, that any omission, insertion or incorrectness in such account, which shall not have been made through such culpable negligence or fraud as aforesaid, shall not defeat or otherwise affect such deed or memorandum of arrangement."

228. "That the creditors of every such trader shall have the same rights respectively as to set-off, mutual credit, lien and priority, and

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creditors. The ground of the refusal was that the document in question was not a deed within the meaning of the above sections.

It was dated on the 22nd of *November* 1854, and purported to be made between the Appellant of the first part, certain persons named as inspectors of the second part, and the several persons whose names and seals were set and affixed to the deed, being severally creditors or agents of creditors of the Appellant, of the third part. It recited that the Appellant was then indebted to the parties thereto of the third part respectively, or to their respective principals, in the several sums of money set opposite to their respective names in the schedule thereunder written. It further recited that at a meeting of the creditors of the Appellant, held on the fifth day of *October* then last, it was represented to them, by or on behalf of the Appellant, that through various unforeseen circumstances

joint and separate assets shall be distributed in like manner as in bankruptcy; and no creditor shall be prejudiced or affected by being a party to any such deed or memorandum of arrangement as aforesaid, or by the same being obligatory upon him as to his right or remedy against any person other than such trader; and every person who would be entitled to prove in bankruptcy shall be deemed a creditor within the meaning of the provisions of this act with respect to arrangements by deed."

229. "That if any creditor of any trader shall be desirous to show that the administration of the estate of such trader has not been duly conducted in conformity with such deed or memorandum of arrangement, it shall be lawful for him to apply to the Court by petition, supported by affidavit, stating any facts or circumstances to show that such administration has not been duly conducted, and thereupon the Court shall have full power, and it is hereby fully authorized to consider the subject-matter of such application, and if it shall think fit may direct any inquiry, and in such manner as it shall think proper, into the subject of such application, and generally may make such order and exercise such jurisdiction in or over the subject-matter of such application and the costs thereof as to the said Court shall appear just."

circumstances he was unable to pay immediately all debts and demands owing by him, but that his mines, minerals, stock in trade, the debts owing him, and other his estate and effects at *Titford*, in the county of *Stafford*, would in process of time be sufficient for that purpose, and that he could realize the same if extended time were given him for payment, and that it was therefore agreed that the term or times thereafter given to the Appellant for the collection, getting in, working and disposing of his mines, minerals, estate and effects under the inspection of the persons parties of the second part, and according to the conditions, stipulations and agreements, and in manner thereafter contained.

By the first witnessing part each of the several persons parties thereto of the third part, so far as related to his own acts and deeds, and the acts and deeds of his heirs, executors, administrators, partners or principals, did thereby give and grant unto the Appellant full, free and absolute liberty and licence to conduct, carry on and wind up his mines, minerals trade and business for the term of three years from the fifth of *October* then instant, under the inspection and subject to the approbation and control of the inspectors, if the Appellant should so long live and continue to observe and perform the several covenants and agreements thereafter contained and on his part to be observed and performed, unless the now stating deed sooner become null and void by virtue of the provision thereafter in that behalf contained; and that the several persons parties thereto of the third part respectively, and their respective executors, administrators, partners or principals, partner or principal, would not, during the period of three years, to commence and be computed from the fifth of *October* then last, sue, arrest, prosecute, impede or molest the Appellant in the management, carrying on the mines, minerals, trade, business or

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concerns under the control and inspection aforesaid, nor seize nor possess themselves, himself or herself, of or attach or intermeddle with his goods, estate, property or effects, or any part thereof; and that in case any or either of the several persons parties thereto of the third part respectively, or the executors, administrators, partners or principals, partner or principal, or any or either of them, should act contrary to the agreement lastly thereinbefore contained, the Appellant, his heirs, executors or administrators, should be, and he and they was and were thereby, thenceforth and for ever acquitted, exonerated and discharged of and from all and every the debts, claims and demands which were or was due and owing to the person or persons who, or whose executors or administrators, partners or principals, partner or principal, should act contrary to the said agreement and all proceedings in respect of the same; and that in every such case the now stating letter of licence and agreement might be pleaded in release and in bar to all and every such debts, claims, demands and proceedings.

By the second witnessing part the Appellant covenanted with the inspectors, and also with each of the parties of the third part, that the Appellant would, when requested by the inspectors, or any two of them, make out in writing a true account of all his debts and credits, claims and demands, and estate and property and effects, and of the several charges, outgoings, liens and incumbrances upon or affecting the same respectively, and deliver the same, or a fair copy thereof, unto each of the inspectors, and would at all times thereafter during the period thereinbefore given him for that purpose as aforesaid, use his best endeavours, under the direction of the inspectors, or any two of them, to collect, carry on, work and get in the aforesaid mines, minerals, estate, property and effects for the benefit of the said creditors, and would,

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on or before the 1st of *October* 1855, collect therefrom sufficient to pay the sum of 6s. 8d. in the pound upon the debts of his said several creditors, and would pay and distribute the same unto and amongst his said creditors, their respective executors, administrators and assigns, rateably and in proportion to the amount of their respective debts; the further sum of 6s. 8d. in the pound on or before the 1st of *October* 1856; and the further and final sum of 6s. 8d. in the pound on or before the 1st of *October* 1857; and in the meantime, and until the same monies should be so paid and distributed, would from time to time place or deposit the same for safe custody in the hands of the *Birmingham* Banking Company, in the joint names of the inspectors, or otherwise dispose thereof as the inspectors should direct, subject to the proviso next thereafter contained: provided always, that the Appellant might (so long as he should observe and perform the matters and things therein contained on his part to be observed and performed) be paid out of his estate, trade or business the weekly sum of 4l. for the maintenance of himself and his family, providing sufficient profits were made; and that the inspectors should, out of the monies which they should receive, pay and retain all rent and taxes, law costs, charges and expenses, salaries, wages and allowances for clerks, servants and others employed in the said trade, business or concerns, and the charges and expenses to be incurred in getting in, managing and disposing of the estate and effects in pursuance of the deed; and that if any dividend should be made of the estate and effects of the Appellant before all his said several creditors, by themselves, or their attorneys or agents, should have executed or otherwise acceded to the deed, the Appellant might retain the rateable dividends of every such creditor or creditors, and pay the same to him, her or them respectively, upon his, her or their respectively so executing or acceding to the deed, and
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in default of any such dividend being so retained, might pay to such creditor or creditors, upon his or their respectively executing or acceding to the now stating indenture, a rateable dividend or dividends in proportion to the amount of his or their respective debt or debts out of any further proceeds, before any further dividend or payment should be made to or amongst any of the other creditors, but so that no dividend already made should be disturbed.

Then followed a covenant by the Appellant not to convey, assign, alienate, dispose or in any manner charge or incumber any part of his mines, minerals, goods, estate, property or effects without the consent in writing of the inspectors, or any two of them, or the survivors or survivor of them, and not to do, or commit, or cause, or procure, or knowingly permit or suffer to be done or committed any act, matter or thing whereby any of the creditors of the Appellant should or might obtain or have any further or other security or securities for his, her or their debt or debts than that or those which they respectively had at the time of the execution of the deed, whereby any of the said creditors should have or receive a greater or prior security or advantage in or concerning his, her or their debt or debts than the other or others of them.

Then followed a covenant for keeping proper accounts, and a declaration that the inspectors might appoint one or more clerk or clerks, servant or servants, or other person or persons to assist the Appellant in the management, carrying on, disposal and collection of his mines, minerals, trade, estate, business and effects at such salary or wages, salaries or wages, as they in their discretion should think expedient; and that such clerk or clerks, servant or servants, should alone receive all debts due to the

the said estate and pay all liabilities thereon, and that the Appellant should in no case receive or pay any monies accruing due to or becoming payable from the said estate.

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The deed then contained a stipulation, that if the Appellant should be arrested, taken in execution, attached or otherwise molested by any of his creditors, or if any other reason, cause, matter or thing occurred rendering such a course advisable, the inspectors, or the majority of them, might and were thereby authorized and empowered of their own will and pleasure to enter into and upon and seize and take possession of the said mines, minerals, stock in trade, tools, materials and all other the estate, effects and premises of the Appellant at Tisbury aforesaid, as and for their own absolute property, as fully and effectually to all intents and purposes as though an absolute and unconditional assignment and assurance had already, by the now stating indenture, been made by the Appellant to them, the inspectors of the said mines, minerals, stock-in-trade, materials, estate, effects and premises, but subject, nevertheless, to the trusts and upon the conditions and agreements thereafter contained.

Then followed a declaration, that if by reason of any unforeseen cause, not wilfully occasioned by the Appellant, any delay should take place in the final settlement of his affairs, so as to prevent his said several creditors from receiving the full amount of their respective debts, at or before the expiration of the said term of three years, then and in such case, at a meeting of the said creditors, to be convened for that purpose, the majority in number and value then present might, and they were thereby fully authorized in manner therein mentioned, if they should think proper, to prolong or extend the said term thereinbefore

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thereinbefore given for winding up the affairs of the Appellant, and for payment of his said creditors in manner aforesaid, for the further space of one year.

The deed then contained a covenant by the Appellant to pay the debts in full by the above instalments; and further, that if at any time during the said term or such extended term as aforesaid (if any), if the said trade, business or concern of the Appellant at *Titford* aforesaid, in the judgment and opinion of the inspectors, or the majority of them, should have become or be likely to become embarrassed or less adequate to answer the purposes thereby intended, or in the event of any execution, suit, proceeding or attachment against the person of the Appellant, or his estate, property or effects, or his executors or administrators, or either of them, then and in such case it should and might be lawful for the inspectors, or the majority of them, or the survivors or survivor of them, of their own will and pleasure, to enter into and upon and seize and take possession of the said mines, minerals, stock in trade, tools, materials, estate and effects and premises of the Appellant at *Titford* aforesaid, and eject, put out and remove him the Appellant, his executors and administrators, and his and their clerks, servants and workmen, and to treat him, them and every of them as trespassers; upon trust that the inspectors should immediately thereupon, or as soon after as they or the majority of them, or the survivors or survivor of them, should in their or his discretion think fit, absolutely sell and dispose of all and singular the said mines, minerals, stock in trade, materials, estate, effects and premises, either by public auction or private contract, or partly by public auction and partly by private contract, for such sum or sums as could be reasonably obtained for the same, and by and out of the proceeds of the said sale or sales to pay to and divide

the same amongst all and every the said several persons parties thereto of the third part, rateably and in proportion to the amount of their respective debts and demands, until the said creditors should have received and been paid the full amount of their respective debts and demands, if the said proceeds should so far extend, but not otherwise; and that after such last-mentioned seizure, sale or payment or satisfaction, out of the proceeds of the said seizure or sale as lastly mentioned each and every of the said several persons, parties thereto of the third part, should and would accept the same, whatever the amount might be, in full satisfaction and discharge of their respective debts and demands so due from the Appellant, and would not sue, implead or molest the Appellant, or attach or intermeddle with him or any other estate, property or effects in respect or on account thereof, or in relation thereto; and that the now stating indenture should and might be pleaded in release of and in bar to all and every such debts and demands, actions, suits and proceedings in respect or on account thereof, as if a release or acquittance for the same had been given under the hand and seal, hands and seals, of the said several creditors.

By a further witnessing part, each of the said several persons, parties thereto of the third part, so far as related to the debt or demand due to himself or herself, or his or her partners or principals, and so far as related to the acts and deeds of himself and herself, his and her heirs, executors and administrators, partner and principal, partners and principals, covenanted with the Appellant, his executors and administrators, that the said several creditors (parties or represented parties of the third part) of the Appellant respectively, and their respective executors, administrators, partner and principal, partners and principals and assigns, would accept and receive their

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their said respective debts and demands so then due owing to them respectively from the Appellant as aforesaid, in the manner and at the times in that behalf and by the now stating indenture provided for payment thereof.

Then followed a power of appointing new inspectors and covenants by the parties thereto of the third part to indemnify the inspectors, and also, so long as the Appellant should observe and keep the covenant agreement thereinbefore contained on his part for payment of the said several debts and demands at the respective times and in the proportions thereinbefore appointed for payment thereof, to indemnify the Appellant against all and all manner of bills, notes and other negotiable securities then existing, running or outstanding against him, or on which he was in any manner liable at the suit of any or either of the said several persons parties thereto of the third part, or their indorsees or any other third parties, by their default, privity, consent or procurement; and of, from and against all actions, suits, controversies, claims and demands in respect or on account thereof or in relation thereto, it being the true intent and meaning of the now stating indenture that any and every creditor to whom any bill or note bearing the name of the Appellant should have been given should fully and effectually indemnify the Appellant, his heirs, executors, administrators and assigns, and his and their goods and chattels, lands and tenements therefrom.

The deed concluded with a covenant by the Appellant with the inspectors and with the said several parties thereto of the third part, that the Appellant should and would at any time, at the request of the inspectors and the survivors and survivor of them, the executors and administrators of such survivor,

at the costs and charges of the estate, assign the said mines, minerals, stock in trade, tools, materials, estate, effects and premises at *Titford* aforesaid, unto the inspectors or other the inspectors for the time being, as they should require, subject nevertheless to the indemnity thereinbefore mentioned to the Appellant, in case of possession being taken by the inspectors and the survivors and survivor of them, or other the inspector or inspectors for the time being.

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Mr. *De Gex* in support of the appeal.

The reasons given by the Commissioner for declining to certify that the deed has been signed by six-sevenths of the creditors were threefold.

The first was that the deed did not purport to be made between the debtor and all his creditors. It purports, however, to be between the debtor, the inspectors, and the parties to the deed of the third part, and there is no limitation excluding from the parties of the third part any creditor. The deed does not even contain a very usual restriction of the benefit of the deed to those who come in within a limited time.

The next objection of the Commissioner was, that the deed did not contain an assignment of all the debtor's property, and the recent cases of *Tetley v. Taylor* (a) and *Drew v. Collins* (b) are relied upon in support of this objection. It is to be observed, however, that the law must be regarded as unsettled on this point, for the Court of Exchequer took one view of the act in this respect and the Court of Queen's Bench another, and although

(a) 1 *Ell. & Bl.* 521.

352; *Marsh v. Higgins*, 1 *L. M.*

(b) 6 *Exch.* 670. See also & *P.* 253.

Wagh v. Middleton, 8 *Exch.*

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although the Court of Exchequer Chamber, in *Tetley v. Taylor*, has adopted the view taken by the Court of Exchequer, the same point has arisen in a more recent case of *Larpent v. Bibby* (a), which is now pending before the House of Lords. The difference between the Courts of Queen's Bench and Exchequer will therefore be probably soon decided by the highest tribunal; and if the present case should be thought to depend on the question in difference between those Courts, your Lordships may perhaps think fit to refrain from deciding adversely to the validity of the deed until the case in the House of Lords is decided. In the meantime, however, the reasoning of Lord Campbell in the Court of Queen's Bench seems unanswerable. His Lordship, after reading the 224th section, said (b), "It is impossible to contend that these words necessarily require that the deed should provide for the distribution of all the trader's effects among his creditors, or that they exclude a deed which allows him to remain in possession of them on payment of such a composition as is satisfactory to six-sevenths of his creditors, and on performance of such other stipulations as they consider more for their advantage than forcing him into bankruptcy, or requiring that his trade shall be stopped, that all his property shall be sold, and that they shall accept a dividend from the fund produced by the sale. The section, cautiously and anxiously, guards against the supposition that the deed, to be protected, must embrace all the matters which it enumerates. We can see no absurdity in supposing that composition deeds are meant to be included in the enactment. We know that they are very common in practice, and are frequently

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(a) Since decided (July 23, 1855), but on the ground that the deed was executed before the Bankrupt Law Consolidation Act came into operation. It was

stated that the judges were not agreed on the question argued in *Tetley v. Taylor*.

(b) 1 Ell. & Bl. 528.

very advantageous both for the creditors and the debtor. The composition offered may be considerably more than would be the dividend on an immediate sale and distribution of his effects; and he may be enabled to pay this composition, from the assistance of friends, and from being permitted to avail himself of his position in the commercial world, which would be utterly lost if he were made a bankrupt. A great power is certainly given to the six-sevenths in number and value of the creditors; but they can only place the remaining seventh in the same situation in which they have placed themselves; and it surely would not be imputing any absurdity to the legislature, the words employed by them naturally bearing such a meaning, if we suppose that they considered the risk of the six-sevenths in number and value of the creditors agreeing to accept a composition less than they could obtain by resorting to their legal remedies, was so small as not to deserve consideration, or, at least, to outweigh the risk of fair and beneficial deeds of arrangement being defeated by the refusal of one or two creditors to join in the arrangement, or of dissenting creditors obtaining a preference by refusing to concur until, by a clandestine bargain, their claims are fully satisfied."

But it is submitted that the present deed may be held valid without contravening the cases decided by the Court of Exchequer and Court of Exchequer Chamber. In *Drew v. Collins* (a) the arrangement was that the creditors should take less than 20s. in the pound on their debts, and the decision turned on this circumstance. The Lord Chief Baron said (b), "Any deed which gives to the trader the surplus, after payment of a composition, is not in conformity with the statute; so that the provisions of this deed are ultra what any number of the creditors had a right to make obligatory on the rest."

Mr.

(a) 6 *Exch.* 670.

(b) *Ibid.* 683.

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Mr. Baron *Alderson* said (a), "By this deed six-sevenths of the creditors agree to distribute 6s. 8d. in the pound on the debt of each creditor, and then *give the rest to the insolvent*. Suppose he was able to pay 20s. in the pound instead of 6s. 8d., would it be competent for six-sevenths of the creditors to give him the surplus?" Mr. Baron *Platt* said (b), "If the argument for the Defendant were to prevail this consequence would follow: a trader might have one creditor to the amount of 100l. and one hundred creditors of 9l. each, and the former, being the only creditor above 10l., might by deed enter into an arrangement with the trader to take five farthings in the pound in lieu of all the debts, though the trader might be well able to pay 20s., and thus deprive the rest of the creditors of their just claims." And Mr. Baron *Martin* said (c), "It is not competent for them to give a portion of the estate to the debtor himself." The present deed provides for payment in full of the creditors, and therefore the reasoning applicable to *Drew v. Collins* does not apply here. The same circumstance existed in *Tetley v. Taylor* as in *Drew v. Collins*, with the additional fact of there being no inspectorship clause. The Court of Exchequer Chamber in that case held, that the words "touching such trader's liabilities and his release therefrom, and the distribution, inspection, conduct, management and mode of winding up of his estate, or all or any of such matters or any matters having reference thereto," must by reason of the insertion of the second "and," be read as divided into two groups of requisites, and that there must exist one at least of each group, and that as the deed there did not provide for the distribution, inspection, conduct, management or mode of winding up of the debtor's estate, it was not within the clause. That case therefore, which alone has the sanction of the Court of Exchequer Chamber, was still more distinguishable

(a) 6 *Exch.* 685.(b) *Ibid.* 686.(c) *Ibid.* 687.

able from the present than *Drew v. Collins*, for in the present deed not only are 20s. in the pound to be paid on the debts, but the deed is one touching the trader's liabilities, his release therefrom, and the inspection, conduct, management and mode of winding up his estate, comprehending, in fact, and in all events every one of each set of requisites, except the distribution of the estate, but comprehending that also in the event of the 20s. in the pound not being paid. Therefore, whereas, the act only requires that the deed shall touch all or any of such matters, or any matters having reference thereto, this deed touches them all, and cannot be regarded as affected by *Tetley v. Taylor* or *Drew v. Collins*.

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The 224th section, by express words, includes deeds of inspection. Such deeds are of ordinary use, and that in the present case is taken in all material respects from a precedent contained both in *Forsyth on Composition Deeds* (a) and *Martin's Conveyancing* (b), as one of an usual kind, and fit for general adoption. If it had extended to an abandonment of part of the debtor's estate, while the debts remained unpaid, it might have been open to some of the objections which prevailed in *Drew v. Collins* and *Tetley v. Taylor*; but, being a deed of inspection merely, it surely must be within the terms of the clause. Stress will perhaps be laid, as it was in the argument in the cases already adverted to, on the words of the 228th section, providing that the creditors shall have the same rights respectively as to set-off, mutual credit, lien and priority, and that joint and separate assets shall be distributed in like manner as in bankruptcy; but they only apply to the case of an assignment, and not to a deed of inspection, and the frame of the provision does not exclude a deed of the latter kind from being within the scope

(a) See p. 260, 3rd edit.

(b) See p. 462, 2nd edit.

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scope of the act any more than a power to appoint to the use of such children or child, and in such shares as the donee of the power shall think fit, excludes from the scope of the power an appointment of the whole to one child (a). The words "in such shares" are in such a case held only to apply to the case of an appointment to more than one, and not to cut down the generality of the other words.

The last objection taken by the Commissioner was that there was a reservation of part of the estate. The objection proceeded on the clause which empowers the debtor to retain the dividend of any creditor who has not executed the deed; but this is not a reservation to the debtor, for he is by the terms of the deed a trustee of the retained dividends for the creditors, and the Act contemplates the case of there being no other trustee than the debtor himself.

I submit, therefore, that the deed is entirely within the Act, but even if this is subject to doubt the proper course for the Commissioner to have followed would have been to certify the execution by the six-sevenths of the creditors. In *Drew v. Collins*, Mr. Baron *Martin* said, "Mr. *O'Malley* further relies on the 225th section shewing that a superintending power over these deeds is vested in the Court of Bankruptcy. But the order or certificate there spoken of is merely to testify that the deed has been duly signed; and the only matter, as it seems to me, which the Court can inquire into is whether, in point of fact, the requisite number of creditors have signed the deed." It is obvious that if this course be not adopted, and if your Lordships should hold that upon every occasion when the Commissioner is required

(a) *Doe v. Allchin*, 2 B. & A. 122.

o give his certificate there must be an argument, a decision and possibly an appeal on the construction of these clauses, a question leading to such diversity of opinion as appears to have existed between two of the Courts in *Westminster Hall*, the intention of the framers of the statute, which was to provide for the winding up of estates without delay or litigation, will be greatly frustrated. Indeed the Commissioner's certificate is only required by the Act for the purpose of accelerating the operation of the deed, for at the end of three months the deed is valid without that certificate, and the question of legal validity is in nowise concluded by it. The certificate is by the terms of the Act to be, that the deed has been signed by the prescribed majority, not that it is of the prescribed description, the words of the 225th section being similar to those of the 226th, as to a certificate to be given by the inspectors or trustees, who could not have been intended to decide the question of construction. [*The LORD JUSTICE KNIGHT BRUCE*. Can it be maintained that the Commissioner is bound to certify the execution of any document submitted to him? If so, he might be asked to certify the execution of a marriage settlement.]

Of course the Commissioner would not do so idle a thing as to certify the execution of a document plainly not within the meaning of the clauses. What is submitted is, that if the nature of the document is one merely open to a fair question, such, for instance, as the question which is pending before the House of Lords in *Larpent v. Bibby*, the Commissioner ought to certify; and that even if your Lordships should not entirely agree with Mr. Baron *Martin* on this point, the course most analogous to that taken in cases of adjudications and of certificates of conformity which are disputed on grounds available at law would be to grant

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grant the certificate. If the Court of Bankruptcy certifies the execution of a deed, possibly not conforming to the Act, no one is prejudiced, whereas if it refuses to certify the execution of one which might be held by Court of law to be within the Act, it may be doing irreparable mischief.

Mr. Willcock and Mr. Archibald Smith appeared for the Respondent, a creditor who had opposed the granting of the certificate before the Commissioner.

Their Lordships intimated that they would examine the deed, and on Saturday inform the Respondent's Counsel if they would be required to address the Court

Jan. 27.

The LORD JUSTICE KNIGHT BRUCE.

The Petitioner in this case is an indebted trader who has sought and now seeks to bring himself within the 224th and 225th sections of the Bankrupt Law Consolidation Act, contending that a deed in evidence, which he has executed, is an instrument such as they point out, that the learned Commissioner from whose decision he appeals having thought otherwise. The Petitioner also contends that the learned Commissioner was not bound to exercise and ought not to have exercised any judgment as to the nature of the contents of the document, inasmuch as had been, the Petitioner says, executed by six-sevenths in number and value of his creditors respectively for 10 and upwards.

In my opinion, however, it is impossible to maintain that the Commissioner could duly or properly have made the order or certificate under the 225th section which I was asked to, and his refusal to make which is appealable from

from, while he was not as he appears not to have been satisfied that the contents of the deed were such as to bring it within the 224th; and I think that the success or failure of the present application must depend merely on the question whether the 224th section can and ought to be with respect to the nature and contents of the deed interpreted so as to bring it within the meaning of that section.

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But not an endeavour or attempt to construe the 224th section can properly be made without reading also and attending to the five sections next following it in the statute. These six sections occurring, as they do, in an Act of Parliament containing various passages of difficulty, appear to me as a whole preeminently embarrassing and perplexing. But we cannot, upon language so far from clear, so much otherwise than plain, as that before us, ascribe to Parliament an intention to be grossly unjust, and I think that it could not have meant to bind any dissenting creditor by a deed so defective, so ineffectual and so delusive as that before us without intending gross injustice. I say "defective," "ineffectual" and "delusive," not generally or absolutely, but as meaning only to impute those qualities to the deed in its alleged character of a security or protection to the creditors.

I apprehend that a deed, which neither is a deed of composition, nor does to the extent of the indebted trader's means, or so far as circumstances will allow, provide in a reasonable manner some satisfaction, some effectual security, or some effectual protection, for his creditors, ought not, according to a proper view of the six sections, to be considered as coming within the 224th. Being of opinion that the deed before us is of that description, I agree with the learned Commissioner, and am for dismissing the Petition with costs.

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The LORD JUSTICE TURNER.

This case stood over for the purpose of looking into the deed executed by the Petitioner. Upon examining it I am satisfied that it does not fall within the clauses of the Act upon which this Petition is founded. I agree in the construction which the Courts of Law have put upon these clauses, that in order to bring a deed within the operation of them, the whole estate must be given up to the creditors, and I think it must be so given up in all events, and not in certain events only, and in terms which are clear and unequivocal, and not open to future dispute and difficulty. This deed does not appear to me to amount to such a disposition of this trader's estate. Independently of many other considerations arising upon it, I think it at least open to doubt whether in the event of this trader's death, within the three years mentioned in the deed, the trustees could recover any part of the property against the representatives of the Petitioner, in whom it would be legally vested.

It was argued that the Commissioner was bound to certify upon proof, that the deed had been executed by the required majority of the creditors, but the statute, as I read it, makes the order or certificate of the Commissioner a judicial act, and if so, he must, as I conceive, be bound to look into the deed; but whether he was bound to do so or not, I feel no doubt that he was warranted in examining it.



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DESBOROUGH v. HARRIS.

July 25, 28.

August 1, 4.

Before The
Lord Chan-
cellor, LORD
CRANWORTH.

THIS was an appeal by the Defendant *Samuel Sturgis*, the provisional assignee under the insolvency of the Defendant *Francis Harris*, from a decree of the Vice-Chancellor *Wood*, made on 23rd February 1855, upon the hearing of an interpleader suit. The bill was filed by *Henry Desborough*, who was the secretary, and as such represented the *Atlas Insurance Company*. The facts of the case, as detailed in the bill, were in substance as follow :—On the 19th October 1825 the *Atlas Company* granted a policy, whereby they assured the sum of 3,000*l.* to the Defendant *Francis Harris*, his executors, administrators and assigns, payable within three months after the death of *Judith Grubb*. On the 17th April 1829 the Company received notice of the assignment, by way of mortgage, of the policy to persons represented by the Defendants the Messrs. *Sanders*, by which mortgage deed the assignors of Messrs. *Sanders* were appointed the attorneys of *Francis Harris*, to demand, sue for and recover the policy monies, and the deed empowered them and their assigns to give effectual receipts for the same. In 1834 the Defendant *Francis Harris* took the benefit

A Life Insurance Company received notice of an assignment by an insurer of a policy, which the Company had granted, and the insurer afterwards became insolvent. Soon after the death of the person whose life was insured, the assignee for value applied for payment of the sum due upon the policy, and the Company inquired of the provisional assignee of the insolvent whether he would consent to

payment being made to the assignee for value. The provisional assignee said he could not give such consent, but that it must be sought for from the Court of Insolvent Debtors. The insolvent himself gave notice to the Company not to pay over the policy monies to his assignee for value, on the ground that the debt for which it was assigned as a security was satisfied. In the meantime an action was brought upon the policy by the assignee for value, in the name of the insolvent, against the Company :—
Held, that it was not a case in which the Company were entitled to file their bill of interpleader against the Plaintiff in the action, the insolvent and his provisional assignee, the insolvent having no title, and the title of his provisional assignee being subordinate to that of the assignee for value.

The case of *Fenn v. Edmonds*, 5 *Hare*, 314, overruled.

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benefit of the Insolvent Debtors Act, and by an indenture dated the 18th *January* 1834 all his real and personal estate were assigned to the Defendant *Samuel Sturgis Judith Grubb* died on the 19th *January* 1853, and the policy, with its accumulations by way of bonus, amounted to 4,526*l.* The bill alleged that the Messrs. *Sanders* insisted that they were entitled to recover the monies due on the policy under certain indentures of assignment by way of mortgage, and that the Defendants *Francis Harris* and *Samuel Sturgis* disputed the right of the Messrs. *Sanders* under the said indentures to the policy, and the monies payable thereunder, and that *Samuel Sturgis* claimed the policy and monies as such provisional assignee, and that he had refused to consent to the monies due on the policy being paid by the Company to the Messrs. *Sanders*. The bill stated that on the 15th *August* 1853 the Defendant *Francis Harris* gave notice in writing to the Company that the amount due upon the policy was not to be paid to any individual who was not authorized by letter from him to receive the same; and that the solicitor of the Defendant *Francis Harris* had, on the 17th *August* 1851, written to the Company that *Francis Harris* considered that the amount of the policy belonged to him, and had requested him, the solicitor, to give notice to the Company not to pay over the monies due on the policy without his express authority and consent. The bill also stated that on the 28th *July* 1853 the Defendants the Messrs. *Sanders* commenced an action in the Queen's Bench in the name of the Defendant *Francis Harris*, to recover the amount due under the policy, with interest from the 10th *June* 1853. The bill alleged that the Defendants *Francis Harris* and *Samuel Sturgis* threatened to commence actions against the Company to recover the amount due on the policy. The bill then set out the following correspondence with reference to the policy, and the rights and interests

interests of the Defendants therein, between the solicitor of the Company and the solicitors or agents of the Defendants *Francis Harris* and the Defendants the Messrs. *Sanders*.

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On the 24th August 1853 Mr. *Browning*, the solicitor of the Company, wrote to Messrs. *Rhodes, Lane & Rhodes*, who were then acting as the solicitors of the Defendant *Francis Harris*, as follows:—"Mr. *Cummin*, of *Exeter*, professionally concerned for Messrs. *Sanders & Co.*, bankers, of that city, with Mr. *Philbrick*, of *Girdler's Hall*, have been with me to-day, and stated the result of an interview your Mr. *Lane*, on behalf of Mr. *Francis Harris*, had yesterday with them respecting the claim of Messrs. *Sanders* upon a policy in the *Atlas* Office for 3,000*l.* on the life of Mr. *Judith Grubb*, which was assigned to those gentlemen in the year 1825, as collateral security with an estate in *Devonshire* for payment of 3,750*l.*, upon which there was an existing charge of 3,000*l.*, and to cover which the policy in question was effected. This policy (which by its accumulations has increased to the sum of 4,526*l.*) has recently become a claim, and before the same was paid I thought it right, on the part of the Directors of the *Atlas* Company, to require the concurrence or consent of Mr. *Harris* on payment of the amount to Messrs. *Sanders* under their security. This requisition ultimately led to the interview you had yesterday, and Mr. *Cummin* and Mr. *Philbrick* inform me that they presented to you and Mr. *Harris* an account stated as between Messrs. *Sanders* and Mr. *Harris*, touching their claim under their security, including the payment of the premiums by Messrs. *Sanders* since the year 1828 on the policy, and that on the part of Mr. *Harris* you expressed yourself satisfied that Messrs. *Sanders* are clearly entitled to receive the full amount now due on the policy, and that neither Mr.

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Harris nor the official assignee under his insolvency has any claim upon it. It is the desire of the Directors of the *Atlas* Company to satisfy this claim with the least possible delay, and without giving any trouble and inconvenience to any party, and as soon as they can be satisfied there is no reason to anticipate any interference or objection by Mr. *Harris*. Mr. *Philbrick* told me he had no doubt you would answer any inquiries I might make of you on the matter, and therefore I should be much obliged if you would acquaint me whether, as far as Mr. *Harris* or his estate are concerned, you are satisfied they have no claim on the policy in question. Mr. *Philbrick* informs me you have a statement of the account referred to, but if not I shall be glad to show them to you."

No answer to such letter was received by Mr. *Browning*, and on the 7th *September* 1853 Mr. *Philbrick*, the town agent of the solicitor of the Defendants the Messrs. *Sanders*, wrote to Mr. *Browning* as follows:—*Harris v. The Atlas Company*.—"In consequence having heard from Mr. *Cummin* that *Harris* had been insolvent some years since, I accompanied him to the Court to see the official assignee, and ascertain if he would assent to *Sanders & Co.* at once receiving the money on the policy, and, after some search, it appeared that *Sanders & Co.* were inserted in the schedule of creditors for 4,500*l.* and interest, he stated that if the Company would pay them he would offer no objection but that if the sanction of the Court was obtained, and without which he could not officially consent, the Court would require some part of the money to be held by him for the creditors."

On the 13th *September* 1853 Mr. *Harrison*, the solicitor of the Defendant *Francis Harris*, wrote to Mr. *Browning*

Browning as follows:—"Mr. *Harris* has placed in my hands your letter dated the 24th instant, addressed to Messrs. *Rhodes, Lane & Rhodes*, and requested me to reply to it. In your letter of the 24th, you request to be informed whether Mr. *Harris* is satisfied that neither he nor his estate have any claim on the policy in question, and you say that you have a statement of accounts which you will be glad to show. As Mr. *Harris's* solicitor, acting also as well for the benefit of his estate, I beg to inform you most distinctly, that Mr. *Harris* is not satisfied that neither he nor his estate have any claim to this policy, but that, on the contrary, as far as I can judge, I believe, and it is Mr. *Harris's* intention to contend, that the whole of the monies due on this policy belong to his estate. I have been in communication with Mr. *Cummin* on this subject, but have not been able to obtain any satisfactory account or explanation from that gentleman, and therefore, as you say you have a statement of accounts, which you will be glad to show, I shall be much obliged if you will inform me whether you have any objection to allow me to inspect these accounts, and if not, that you will be good enough to name a time most convenient to yourself, when I could attend at your office for that purpose. I should inform you that Mr. *Harris* has no desire to throw difficulties in the way of Messrs. *Sanders* receiving the amount due on this policy, if they are properly entitled to it; but when Mr. *Harris* sees himself tampered with, by offers of small sums of money to procure his concurrence, and an unwillingness on the part of Messrs. *Sanders* to furnish any satisfactory account, you will admit that he is fully justified in insisting upon all proper information to satisfy himself they are properly entitled to this portion of his estate,—more especially when I tell you that they have already appropriated an estate of more than 200 acres to their own use, which Mr. *Harris* stated upon oath to be worth 9,000*l.*,

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9,000*l.* in 1834, and which may well be estimated, considering the price of land at the present time, to be worth considerably more.

On the 10th *October* 1853 Mr. *Harrison* wrote to Mr. *Browning* as follows:—"Sir,—*Harris* and *Sanders*—When I had an interview with you herein, you informed me that Messrs. *Sanders* had brought an action in the name of Mr. *Harris* against the *Atlas Assurance Company*, to recover the amount due on the policy effected on the life of the late Mrs. *Grubb*, I now give you notice, that Mr. *Harris* never executed any power authorizing Messrs. *Sanders* to use his name in any way connected with the policy in question, and that the action brought by them against the *Atlas Company* has been commenced without his knowledge, consent or authority, Messrs. *Sanders* having no claim whatever to the monies due on the policy; Mr. *Harris* will also contend that the monies due on the policy must be considered as after-acquired property, and liable to the payment of his subsequent debts, and consequently that the official assignee of the Insolvent Debtors Court has no interest in the policy also. Mr. *Harris* will further contend, that the letter referred to in your note to me, of the 23rd ultimo, as constituting the notice of assignment, is an insufficient notice, until I am satisfied on his behalf, that it is so by being furnished with a copy of it. As, however, Mr. *Harris* has been advised to bring an action against the Company to recover the monies due on the policy, for his own benefit, I shall feel obliged by your giving me the name of the officer appointed to sue and be sued on the part of the Company, and inform me when you will give an undertaking to appear on his behalf."

On the 17th *October* 1853 Mr. *Harrison* wrote M

Mr. Browning as follows:—"As regards the official assignee, if any difficulty arises in that quarter, Messrs. *Sanders* will have only themselves to blame for it. I, however, contend the official assignee has no interest, and if you look at the case as it is, you will discover that I am correct in my views of it, and that he has none. No one can give a valid discharge to the *Atlas* Company but *Mr. Harris*, and no one can legally compel payment, if the *Atlas* refuse payment, except my client; therefore with a view to put an end to all further question, and I think it will be to the advantage of Messrs. *Sanders*, I propose (but, of course, without prejudice) that Messrs. *Sanders* should receive 3,000*l.* out of the policy money to meet the charge on the estate, and that the balance should be paid to my client. If the assignee should think he can interfere, he must proceed against my client under the provisions of the Insolvent Act. Should this proposal be objected to, you will please furnish me with the information requested by my letter to you of the 10th instant." In answer to this letter *Mr. Browning*, on the 17th October 1853, wrote to *Mr. Harrison* to the effect that the Company were most desirous, as they had been ever since the claim was made, to pay the amount due on the policy, but that they must insist on receiving a proper discharge. On the 1st December 1853 Messrs. *Buckley* and *Philbrick*, the town agents of the solicitor of the Defendants the Messrs. *Sanders*, wrote to *Mr. Browning* as follows:—"Harris v. The Atlas Company. We have just obtained counsel's advice as to the course to adopt, and are advised to proceed with the action; we shall therefore declare shortly."

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The bill prayed that the Defendants *F. Harris*, *S. Sturgis* and the Messrs. *Sanders* might interplead together, and that it might be ascertained to whom the Policy monies belonged and ought to be paid, and that the

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the Plaintiff might, on behalf of the Company, be liberty to pay the same, with interest, from the 1st June 1853, into the Bank of *England*, in trust in t cause, and for an injunction to restrain the Defenda from proceeding with the action already commenced, : from commencing any other action at law against Company in respect of the matter aforesaid.

The Defendants the Messrs. *Sanders* stated in th answer, that at an interview which Mr. *Cummin*, th country solicitor, and Mr. *Philbrick*, his town agent, l with the Defendant *Samuel Sturgis*, at the office of Insolvent Court, on the 24th *August* 1853, the Defend *Samuel Sturgis* said that there was no doubt that equity they were entitled to the money owing on policy, and if they would satisfy the Plaintiff's Comp and get the money without his concurrence, he sho offer no opposition, and that subsequently, being desir if possible of removing the Plaintiff's objections to p ment of the money, their solicitor, Mr. *Philbrick*, w to *Samuel Sturgis* requesting him to inform them whet it was his intention to claim any interest in the pol and if not whether he would allow his name to be u in any proceedings, and that in reply thereto Mr. *P. brick* received a letter from *Samuel Sturgis* as follows "Sir,—If the assignment of the policy were not absol and unredeemable, I believe the assurance company m have the joint discharge of the provisional assignee of insolvent. The provisional assignee's title is in trust the whole body of creditors. It is not usual, nor wo it be just for that title to be exercised for the benefi one party, and without any consideration to the body creditors. It has been stated that Messrs. *Sande* security charged some other property besides the estate alluded to. As the whole case appears to invo a matter of important accounts, I can give no consent
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lating to it; as you will see such an act would, in my situation, be incurring an improper responsibility.—I am, Sir, your faithful servant, *Samuel Sturgis*, provisional assignee.”

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They submitted that the claim made by *Francis Harris* was not sufficient to entitle the Plaintiff to file a bill of interpleader, inasmuch as the same was not a bonâ fide claim, and even if the same were a bonâ fide claim, yet, inasmuch as payment in the action commenced by them in the name of *Francis Harris*, would have effectually protected the Company from any further claim by *F. Harris*, such claim did not constitute sufficient ground for interpleader. With reference to the alleged claim of *Samuel Sturgis*, they submitted whether he made any claim which formed a sufficient ground for interpleader, and insisted that if the Court should be of opinion that *Samuel Sturgis* had so acted as to justify the Plaintiff in instituting this suit, he ought to pay the costs of this suit; but if he had not so acted, then that the Plaintiff ought to pay the same.

Mr. *Sturgis*, in his answer, stated thus:—“ I have declined to consent to the payment to the Defendants the Messrs. *Sanders* of the monies due upon the said policy, conceiving that I could not properly do so, having regard to my character and position as trustee for the creditors of the said insolvent, and that the last-named Defendants, if they had not obtained from the insolvent an absolute assignment of the policy, had no right to call upon or require me to perfect their security thereto. I do not further or otherwise, save as herein appears, in any manner deny or dispute the right of the Defendants the Messrs. *Sanders* to the said policy and the monies payable thereunder; but I leave them to make out their claim thereto, and to recover the same as they may be advised. I do not

mence an action at law, or take any other process against the said Company to recover the amount on the policy, or any part thereof. I do not know cannot set forth, whether the Defendant *Harris* has not commenced an action against the Company to recover the sum due under the policy, or whether he has threatened or intend to do so. And I declare prior to the institution of this suit, made any claim ever to the policy in the bill mentioned, or the same thereby secured. And I submit and humbly in I ought, under these circumstances, to be paid the costs of this suit."

The Defendant *F. Harris* by his answer stated that he had mortgaged certain freehold premises to the Defendants the Messrs. *Sanders* shortly before the assignment of the policy, but added that he believed, after satisfying all his creditors, at the time of his insolvency, that the Defendants the Messrs. *Sanders*, there would be something coming to him from the policy monies; and he submitted that if the Messrs. *Sanders* were, as they alleged, entitled to hold the freehold premises, their claim in respect of the mortgage must be treated as satisfied, and that the surplus of the policy monies, after the satisfaction of his creditors, was payable to him; and he submitted that he disputed the right of the Defendants the

the following effect :—I had an interview with the Defendant *Samuel Sturgis*, the provisional assignee of the Insolvent Debtors Court, and as such the assignee of the Defendant *Francis Harris*. My object in seeking that interview was to obtain the assent of the said *Samuel Sturgis*, as such assignee, to the payment by the *Atlas* Company of the sum of 4,526*l.*, as the amount due on the policy in the pleadings mentioned to the Defendants the Messrs. *Sanders*, who had claimed the amount of such policy from the Company. I stated to Mr. *Sturgis* that there was an adverse claim by the Defendant *Francis Harris* to the amount due on the policy, and that the Company had been advised that it would not be safe for them to pay the amount to Messrs. *Sanders* without the concurrence of Mr. *Harris* or of his assignee, if insolvent, and asked him if he would consent to the Company's paying the amount to Messrs. *Sanders*; to which he replied that he could not give such consent, but that it must be sought for from the Court of Insolvent Debtors, and added that if such consent of the Court were applied for it would require a certain sum to be applied to the general creditors of the insolvent, as had been done in similar instances.

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When the cause was heard by the Vice-Chancellor, his Honor, in giving judgment, expressly stated that he did not rely on the authority of the case of *Fenn v. Edmonds* (a), but declared that in his opinion the statement made by Mr. *Sturgis*, on the occasion of his interview with Mr. *Browning*, amounted to a claim which justified the Plaintiff in making Mr. *Sturgis* a Defendant to the interpleader suit, and that he ought to pay the costs of the litigation. The Vice-Chancellor directed that the Plaintiff should have his costs of the suit out of the

(a) 5 *Hare*, 314.

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the fund, the balance to be paid to the Defendants the Messrs. *Sanders*; and the Defendant *Sturgis* was ordered to pay the Defendants the Messrs. *Sanders* their costs together with the costs of the Plaintiff, which had been ordered to be deducted out of the fund. From that decree the Defendant *Samuel Sturgis* now appealed to the Lord Chancellor.

Mr. *James* and Mr. *Rasch* for the Plaintiff, *Dorough* in support of the decree of the Vice-Chancellor.

We submit that under the circumstances of this case the Plaintiff had no other alternative but to file the present bill of interpleader, and the Defendant *Sturgis*, having properly raised a claim upon the fund, was justly ordered to pay the costs of the suit; *Martinius v. Helmuth* (a). The authority of *Fenn v. Edmonds* (b) is precisely in point, the facts there being almost identical with those of the present case, with the exception that that was a case of an assignee under a bankruptcy, while the Defendant *Sturgis* here is an assignee of an insolvent; but this can make no difference. The right of a Plaintiff in an interpleader suit is to be protected not merely from a double liability but from double vexation, *East and West India Dock Company v. Littledale* (c). The action commenced by the bankers would not have settled the point at issue, for they could not have given a discharge nor freed the *Atlas* Company from liability to *Harris* if he were solvent, and his right to sue vested in his assignee; *D'Arnay v. Chesneau* (d), *Swann v. Sutton* (e).

Mr. *Rolt* and Mr. *Bazalgette* appeared for the Defendants the Messrs. *Sanders*.

They

(a) 2 V. & B. 412, in notis.

(d) 13 M. & W. 796.

(b) 5 Hare, 314.

(e) 10 A. & E. 623.

(c) 7 Hare, 57.

They referred to the cases of *Glynn v. Locke* (a),
Cochrane v. O'Brien (b).

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Mr. *Headlam* and Mr. *Tripp*, for the Defendant *Francis Harris*.

The *Solicitor-General* and Mr. *Osborne*, for the Defendant *Samuel Sturgis*, in support of the appeal.

The Plaintiff has no ground for the institution of this suit, there being no adverse claimants. The right to file the present bill of interpleader can only be supported either by showing that the Defendant, *Samuel Sturgis*, asserted a claim, or that the Defendant *Harris* had a right. With respect to the right or claim of the Defendant *Harris*, there can be no question as to its invalidity, if his assignee does not claim, and it is quite clear that he ought never to have been made a party, *Rochfort v. Battersby* (c). We do not question the authority of the case of the *East and West India Dock Company v. Littledale* (d), as to the right of a party to protect himself from double vexation, but we submit that the two claims must be shown to have some colour of title. Here the claim, if any, of the Defendant *Sturgis* must be shown to be in opposition to the claim asserted by the Defendants the Messrs. *Sanders*; but at the most the claim which the Defendant *Sturgis* can be said to have preferred was a claim subordinate to that of Messrs. *Sanders*, and it was surely competent for him to have claimed an interest in the equity of redemption, subject to their mortgage. All that the Defendant *Sturgis* ever wrote or said upon the subject of a claim amounted to this, "I am unwilling to do anything actively or officially without the sanction of the Court of which I am the ministerial officer." In such

(a) 3 *Dru. & War.* 11.

(c) 2 *H. L. Ca.* 388.

(b) 2 *Jo. & Lat.* 380.

(d) 7 *Hare*, 57.

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such capacity the provisional assignee had no right to release or assign any property of the insolvent without the sanction and direction of the Court for the Relief of Insolvent Debtors, and his powers and duties in such cases are prescribed by the 42nd and 68th sections of the Act 1 & 2 Vict. c. 110. But admitting for the sake of the argument that the Defendant *Sturgis* took an erroneous view of his rights, still that would not have justified the filing of this bill of interpleader, because it is founded on *Harris's* disputing the Messrs. *Sanders's* title. But it is to be observed that *Harris* could not have revoked the power of attorney to give discharge in his name, nor was that power of attorney affected by reason of his insolvency, and the consequent devolution of his rights on his assignee, who could only be entitled to any surplus after satisfaction of the claims of Messrs. *Sanders's* debt. In the present case the Messrs. *Sanders* have shown that the amount owing to them exceeded what was due under the policy, and there could therefore be no beneficial interest either in the insolvent or his assignee, *Leslie v. Guthrie* (a). The decision in *Fenn v. Edmonds* (b), so far as it makes the provisional assignee pay the costs, is very questionable, and the Vice-Chancellor *Wood*, in pronouncing his judgment, expressly stated that his decision was not based on that authority. The true reason why in that case the official assignee was made to pay the costs was, that he did not appear, and the Plaintiff and other Defendant took such decree as they could abide by, and agreed to pay his costs, adding them to his own as against the absent Defendant. The form of the decree is erroneous, for it assumes to determine the rights of the parties.

Mr. *James*, in reply.

It is not necessary that there should be two active claimants

(a) 1 B. N. C. 697.

(b) 5 Hare, 314.

claimants of the property to warrant a bill of interpleader, it is sufficient that there is a *probabilis causa litigandi* on the part of two claimants for the same debt or obligation. The Insurance Company has a right to be discharged by the legal owner; the Defendants the Messrs. *Sanders* alleged that *Sturgis* alone could give a valid receipt, but according to the rule, as established in *D'Arnay v. Chesneau* (a), such rights remained in the assignor *Harris*, as trustee. It is clear that the plaintiff has a right to deduct his costs, upon paying the money into Court. [The LORD CHANCELLOR. Not always, because a stranger might claim without a shadow of right; in such a case, if he were made a party, the Plaintiff would not necessarily have his costs out of the fund.] As to the power of attorney warranting a discharge by the Messrs. *Sanders* alone, and dispensing with the receipt of the provisional assignee, such a contention is answered by the case of *Brasier v. Hudson* (b), where it was held that the presence of a clause, empowering an assignee of a charge upon an estate, by way of mortgage, to give an effectual discharge, did not dispense with the necessity of adding subsequent incumbrances. As to there being no warrant for such a decree in cases of interpleader, the authority of *Angell v. Haddon* (c) is an answer; in that case Sir *Wm. Grant* says, "If, therefore, at the hearing the question between the Defendants is ripe for decision, the Court decides it." The authority of *Fenn v. Edmonds* (d) has never been impugned, and, at the date of that decision, the decree against the absent Defendant could not have been in consequence of the Plaintiff being at liberty to take such decree as he could abide by, that practice having been abolished, and the judge being required to be satisfied that the case of the Plaintiff was proved against the absent

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(a) 13 M. & W. 796.

(c) 16 Ves. 202. See p. 203.

(b) 9 Sim. 1.

(d) 5 Hare, 314.

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absent Defendant. As to the Defendant *Sturgis* fill[ed] an official character, the very same argument was urged on behalf of his predecessors in office and disallowed the cases of *Appleby v. Duke* (a), *Clarke v. Wilmot* (b)

The LORD CHANCELLOR.

August 4.


* This was a bill of interpleader, instituted by the Plaintiff, who may be described as the *Atlas Insurance Company*, and who represents them according to the provisions of their Act of Parliament. The date and facts which are material are these:—On the 1st of *October* 1825 the *Atlas Insurance Company* insured a sum of 3,000*l.*, payable to *Francis Harris* upon the death of *Judith Grubb*; on the 31st of *December* 1825 Mr. *Harris* assigned the policy to persons represented by the Defendants, the Messrs. *Sanders*, who are bankers at *Exeter*, as a security for the sum of 3,750*l.* It should be stated that previously to that they had, to secure the same sum, also mortgaged certain real property, and had assigned another policy for the same sum of 3,000*l.* payable on the death of *Judith Grubb*, but which had been effected in another office. For some reason, it does not appear what, that policy was agreed to be dropped and a new policy effected in the *Atlas Company*, which is the policy now in question. The result is, that the Defendants the Messrs. *Sanders* hold, as a security for the 3,750*l.*, the real estate and the policy, which was effected on the 19th *October* 1825, in the *Atlas Office*. Notice of this assignment was duly given to the office by the Messrs. *Sanders* in *April* 1829. In 1830 the Messrs. *Sanders* took possession of the real estates and have ever since remained in possession. In the year 1830

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(a) 1 *Phil.* 272.

(b) 1 *Phil.* 276.

Francis Harris took the benefit of the Insolvent Act, and all his property was transferred to the provisional assignee, now represented by Mr. *Sturgis*; whether he was the provisional assignee at the time of the insolvency, or has since succeeded to the office, is immaterial, for all the property that was transferred to the provisional assignee certainly is now vested in him. On the 19th *January* 1853 *Judith Grubb*, the life insured, dropped, and on the 6th of *December* 1853 the present bill was filed by the Plaintiff representing the *Atlas* Company, alleging that *Harris* and *Sturgis* disputed the right of the Messrs. *Sanders* to receive the money due on the policy.

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Now the foundation of the right to file a bill of interpleader is, that there is a conflict between two or more persons claiming the same debt or obligation. That is stated in all the cases and in all the treatises of authority on the subject, and is a matter which admits of no doubt. Where such a state of things exists, and when that double claim has not been occasioned by the conduct of the person who is liable to discharge the debt or obligation, he may obtain the assistance of this Court, and upon bringing into Court the amount of the debt in dispute, the Court will relieve him, and put the conflicting claimants to litigate their rights between one another. I guard myself thus in saying, that when the liability is not occasioned by the act of the person liable, for otherwise there is no case of interpleader. That was the case, before Lord *St. Leonards*, of *Cochrane v. O'Brien* (a), in which a person paid a sum of money into a bank in his own name upon a deposit receipt, and shortly afterwards, by his direction, his brother lodged an additional sum in the same bank, and obtained a new deposit receipt in the name of their sister, for the whole amount, and the old receipt was cancelled: the first depositor having died, his brother,

(a) 2 J. & L. 380.

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brother, as his administrator, claimed the money, alleging that the gift to the sister was incomplete, while she also demanded the money of the bank; but Lord *Leonards* held, upon very intelligible principles, that this was not a case of a double demand for one duty, though a case in which there might be two liabilities, and decided that it was no case for interpleader on the part of the bankers. They had given a right of action in respect of what was, in truth, the same sum of money to two different people, and that would not enable those two in an interpleader suit to litigate between themselves; both of them might have acquired a right. I think that the same principles of reasoning guided Lord *Cottenham* in the case of *Crawshay v. Thornton* (a). There he says, "The case tendered by every such bill of interpleader ought to be, that the whole of the right claimed by the Defendants may be properly determined by litigation between them, and that the Plaintiffs are not under any liabilities to either of the Defendants beyond those which arise from the title to the property in contest." In other words, if there be a double claim which has been occasioned by the act of the party seeking interpleader, he cannot have relief from the Court. In order, however, to establish a case for interpleader, it is necessary there should really be conflicting claims, and the question here is whether there are conflicting claims, or rather, I should say, whether there were when the bill was filed.

Now the real state of the case with respect to the rights of the parties is clear. *Harris* had no pretence whatever, at all events no pretence for any beneficial interest in the policy, for all the beneficial right of redemption certainly had passed to *Sturgis* by virtue of his insolvency. I do not think it is necessary for me to

(a) 2 M. & C. 1. See p. 19.

into the question as to the conflicting decisions, or at least the apparent conflict of decisions which exists, as to whether the right of action in such a case as the present, where there is a right of redemption, remains in the insolvent or passes to the provisional assignee. I own that I cannot feel any very great doubt that it must pass to the provisional assignee, because it may be a matter of value. If the insolvent is a mere trustee at the time of his insolvency, then the right of action does not pass to the provisional assignee any more than it does in bankruptcy; but, if there be a right to redeem on payment of a certain sum of money, I cannot imagine on what principle it can be said that you are to look into the question, how far it is probable, or how far the result will show, that the right of redemption is valuable or is not valuable; it may be valuable, and I think all convenience seems in favour of holding that as such it passes to the provisional assignee. However, that is a matter with which I will not embarrass myself. It may be that the dictum, if not the decision, of the Court of Exchequer in *D'Arny v. Chesneau* (a), is at variance with the prior case in the Common Pleas of *Leslie v. Guthrie* (b); it may be they are reconcilable one with the other. In the view I take of this case, the question does not arise, therefore I merely advert to them to show that I have not overlooked the argument that was addressed to me on the subject, but it does not appear to me necessary to decide between those two authorities. In the present case, the only possible claim adverse to the Messrs. Sanders, was that of Mr. Sturgis, for Harris was entirely out of the question. There can be no doubt that if there was any beneficial interest in Harris, it passed to Mr. Sturgis, the provisional assignee; but Mr. Sturgis's claim was not in truth, as it appears to me, an adverse claim;

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(a) 13 M. & W. 796.

(b) 1 Bing. N. C. 697.

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claim ; it was nothing but a claim after the Messrs. *Sanders* were satisfied, for the assignment to them was no disputed. In many of the cases which are reported in the books the question has been a question arising between the assignor and assignee, where, either on the ground of fraud or on some other ground, the validity of the assignment which was to give a title to the assignee has been disputed and it has been held to be a good cause for interpleader. Here there is no question at all that *Harris*, before his insolvency, and therefore I may say *Sturgis*, assigned to the Messrs. *Sanders* ; the only question is, whether the trusts upon which the assignment was made had or had not been so satisfied as that *Sturgis* might have a right.

The mere fact that the assignee is only a mortgagee does not of itself give any right to call on the assignor and assignee to interplead ; the two claims are not conflicting. I do not say that a mortgagor might not, by his conduct, make a case in which his debtor might file a bill of interpleader against him and his mortgagee ; as for instance, if the mortgagor gave notice to the debtor that since the mortgage he had satisfied the demand of the mortgagee, so that the assignment, by way of mortgage, was no longer in force ; but without such notice setting up what would be in substance a claim independent of his character of mortgagor, no right exists in the debtor to call on the original creditor and mortgagee to interplead.

I do not think the objection, that there is no declaration in the deed of assignment that the receipts of the mortgagee shall be good discharges, can be sustained ; for in the first place the deed contains the usual power of attorney enabling the mortgagee to demand, sue for and recover the policy monies, and to give effectual re-

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ceipts for the same; and further, the nature of the transaction necessarily implied such a power, for the Company never could ascertain what were the equitable rights between the mortgagor and mortgagee of a policy, depending, as they must, on the state of the accounts, which are beyond the control of the persons bound to pay.

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I cannot conceal from myself that in thus holding that the relative position of mortgagor and mortgagee does not give a title to the debtor to file a bill of interpleader, I am altogether disregarding the authority of *Fenn v. Edmonds (a)*. With all respect to Sir *James Wigram*, I must say if that case is fully and accurately reported, it is one which I cannot follow. It appears to me to proceed on the assumption that assignees in bankruptcy are bound to be active in confirming a prior assignment made by the bankrupt, if called on for the purpose by the person who has to pay, and if they decline, that they may be treated as setting up a claim to what has been assigned. I can find no warrant for such a doctrine. It is, in truth, a further assurance which is asked for, and which, except by reason of special contract, no one is bound to make. I collect from the note of Vice-Chancellor *Wood's* judgment, that he entertained great doubt as to the decision in *Fenn v. Edmonds (a)*, and he ultimately decided this question on the ground that Mr. *Sturgis* had in substance asserted a claim on the occasion of his interview with Mr. *Browning*. I confess I do not so interpret what he then said. [His Lordship here referred to the passages in the answers of the Defendants the Messrs. *Sanders* and the Defendant *Samuel Sturgis*, set out in the report, and proceeded.] Now that is the representation given by the Defendants the Messrs. *Sanders* and by Mr. *Sturgis* in their answers. I think the

(a) 5 Hare, 314.

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the real meaning of the statements made by Mr. *Sturg* in his answer, and on the occasion of the interview with Mr. *Browning*, cannot be misunderstood, and I interpret them thus:—"If you want further assurance, I can only give that under the sanction of the Insolvent Court, at that Court, I contend, will only authorize me to give for a consideration; whether you ask for it, and think worth purchasing, is for you to determine. I claim nothing; I am passive; if you want me to be active you must pay for my activity." I consider this to be a claim which justifies a bill of interpleader. It was a claim except in the event of the Messrs. *Sanders* asking for something which he was not, as provisional assignee bound to give. I think therefore this bill ought to have been dismissed with costs against the Defendant *Sturg*. With respect to the Defendant *Harris*, he certainly made a claim which he persisted in up to the answer, though it was properly abandoned by his counsel at the hearing; there being no pretence for it, there could be no case of interpleader between him and the Messrs. *Sanders*, who were actually suing the Company in the name of *Harris*; so that the only question would have been, if it could be stated as a serious question, whether he would recover for himself or for others; but that was not a case for interpleader. The result therefore in my opinion is, that the whole fund ought to have been transferred to the Messrs. *Sanders* without any deduction, and the bill ought to have been dismissed with costs against them and the Defendant *Sturgis*, and without costs against the Defendant *Harris*.

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JAMES v. RICE.

THIS was the Appeal of the Plaintiff from the dismissal of his bill by Vice-Chancellor *Wood*. The cause was heard before the Vice-Chancellor on a motion to take the bill pro confesso, the Defendant not appearing.

The case is reported by Mr. *Kay*, page 231, but the following outline of the statements of the bill will be sufficient for the purpose of this report.

On the 12th of *May* 1851 the Plaintiff lent the Defendant 100*l.* on the Defendant's promissory note for that amount, payable on demand, with interest at 6*l.* per cent. per annum. As a collateral security the Defendant deposited with the Plaintiff the title deeds of freehold property, but without any written memorandum. On the 4th of *June* 1851 the Plaintiff lent the Defendant the further sum of 50*l.* on his promissory note for that amount, with interest at 6*l.* per cent. per annum. In *June* 1852 the Plaintiff lent the Defendant the further sum of 60*l.*, and at the same time the Defendant gave the Plaintiff an unstamped memorandum, which was as follows:—

"*June* 5th, 1852. I hereby acknowledge to have received this day from *David James*, of *Capel*, the sum of sixty pounds on loan, to be repaid in one week, with interest of ten shillings for the use of the same, and with interest of ten shillings for every week so long as the said loan shall remain unpaid.

"*Michael Rice*.

"Witness, *Ann Millard*.

"£60 : 0 : 0."

The

Motion to dispense with service on a Defendant of a copy of a decree on a bill taken pro confesso before the lapse of three years refused.

June 9.

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Money was advanced before the passing of the 17 & 18 *Vict.* c. 90. at 6*l.* per cent. on a promissory note, and a deposit of title deeds of freehold property as a collateral security. Afterwards it was agreed by parol that a legal mortgage should be executed by the borrower to secure the amount advanced with interest at 5*l.* per cent. per annum, but no mortgage was executed:—*Held*, that the parol agreement was sufficient to change the contract to a legal one, and that a return and fresh deposit of the deeds was not necessary to take the second contract out of the Statute of Frauds.

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The bill contained the following statement:—"The Defendant made default in payment of the said sum of 60*l.* and interest; and in the month of *July* or *August* 1852 the Plaintiff had an interview with the Defendant and then proposed that the Defendant should execute to him a legal mortgage of the said freehold premises, on which the title deeds had been so deposited as aforesaid together with certain leasehold property at *Chislehurst* in *Kent*, which the Defendant then stated he had recently agreed to purchase to secure the said several loans, and interest thereon, at the rate of 5*l.* per cent. per annum to which proposal the said *Michael Rice* agreed, but such mortgage was never completed."

The prayer was for foreclosure or sale.

Mr. *J. V. Prior*, for the Plaintiff.

The Vice-Chancellor decided against the Plaintiff, on the authority of *Ex parte Warrington* (a); but assumed that the cases cannot be distinguished as regards the original contract, still the subsequent contract in the present case was perfectly free from objection on the ground of usury. The Vice-Chancellor considered that the Statute of Frauds precluded the Plaintiff from insisting on the subsequent contract. But the Statute of Frauds must be pleaded, or the benefit of it must be claimed by a Defendant, *Skinner v. M' Douall* (b). And here the Defendant did not appear. [The LORD JUSTICE KNIGHT BRUCE referred to *Ridgway v. Wharton* (c).] The Vice-Chancellor considered, that having regard to the invalidity of the original deposit there must be considered to have been no deposit at all, and that the Plaintiff had not such a possession as to render valid a parol agreement for a mortgage, but must be regarded as having obtained

(a) 3 *De G. Mac. & G.* 159.

Wood v. Midgley, ante, p. 41

(b) 2 *De G. & Sm.* 265. See

(c) 3 *De G. Mac. & G.* 8

obtained the deeds merely as the Defendant's agent. The Defendant, however, could not have recovered them in equity without paying the principal money borrowed, with lawful interest, and therefore the Plaintiff must be looked upon as something more than a mere agent. But the fact of possession made a parol agreement sufficient to create an equitable mortgage; for it is not necessary to go through the ceremony of giving the deeds back to the Defendant, and receiving them from him again. The case of *Ex parte Kensington (a)*, which was not cited to the Vice-Chancellor, is, I submit, decisive in the Plaintiff's favour.

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He also referred to *Ex parte Nettleship (b)* and *Ex parte Lloyd (c)*.

The LORD JUSTICE TURNER.

The deeds being in the hands of the Plaintiff, and there being a parol agreement to give him a legal mortgage, I think that the case falls within the principle of *Ex parte Kensington (a)*, and that the Plaintiff is entitled to a decree.

The LORD JUSTICE KNIGHT BRUCE concurred.

On this day a motion was made on behalf of the Plaintiff, under the 86th Order of May 1845, that the service of an office-copy of the decree might be dispensed with. The motion was supported by an affidavit to the effect that inquiries had been made in all quarters from which information was likely to be obtained as to the residence of the Defendant, but without success.

July 25.

(a) 2 Ves. & B. 79; 2 Rose, 138.

(b) 2 M. D. & De G. 124.

(c) 1 Gl. & J. 389.

Mr.

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Mr. *J. V. Prior*, in support of the motion.

The 86th Order of *May* 1845 provides, that after a decree founded on a bill taken pro confesso has been passed and entered, an office-copy thereof is (unless the Court dispenses with the service thereof) to be served on the Defendant against whom the order to take the bill pro confesso was made or his solicitor. And the 90th Order provides, that where the decree is not absolute, the Court may order the same to be made absolute on the motion of the Plaintiff, made after the expiration of three years from the date of the decree, where the Defendant has not been served with a copy thereof.

Vaughan v. Rogers (a), the late Master of the Rolls held, that the Court could not make such an order prospectively in the circumstances of that case. But in *Benbow v. Davies (b)* such an order was made. As the 86th Order requires the service to be made unless dispensed with by the Court, an application appears necessary to avoid the charge of negligence.

The LORD JUSTICE TURNER.

The proper course appears to be to wait till the expiration of the three years, and then, on applying for the order absolute, to explain why the decree has not been served on the Defendant. It would be premature, as Lord *Langdale* said in *Vaughan v. Rogers (a)*, to make the order prospectively, as the Defendant might make his appearance on the next day, and then the Plaintiff would, without sufficient reason, have been released from the necessity of serving him.

The LORD JUSTICE KNIGHT BRUCE concurred.

(a) 11 *Beav.* 165.

(b) 12 *Beav.* 421.

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In the Matter of the SEA, FIRE and LIFE ASSURANCE Company, and of the JOINT-STOCK COMPANIES WINDING-UP ACTS, 1848 and 1849.

The Case of the Official Manager of the PORT of LONDON SHIP OWNERS LOAN and ASSURANCE Company.

June 3, 4, 13.

THIS was the appeal of the official manager of "The Port of *London* Ship Owners Loan and Assurance Company" against the decision of Vice-Chancellor *Stuart*, affirming the disallowance of the Appellant's claim against the Sea, Fire and Life Assurance Company, in respect of a sum of money alleged to be payable under an agreement for the purchase by the latter Company of the business of the former.

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A registered Insurance Company agreed to sell its business to another registered Insurance Company, and a deed of assignment was accordingly executed, whereby the latter Company cove-

The Port of *London* Company was formed in 1847, and

anted to indemnify the former against all claims. After the business had been carried on for some time by the purchasing Company that Company failed, and both Companies were wound up under the Winding-up Acts. On the official manager of the selling Company tendering a proof against the purchasing Company in respect of claims satisfied by the selling Company, one part of the deed of assignment was produced having affixed to it the seal of the purchasing Company, but another part, alleged to have been executed by the selling Company, was not forthcoming: *Held*,
1. That after what had taken place, it was unnecessary to determine whether the selling Company had executed the purchase-deed, or whether its directors had exceeded their powers in making the sale.

2. That, where a purchaser has enjoyed the subject-matter of a contract, every presumption must be made in favour of its validity.

3. That, if all the proceedings on the part of the directors of the purchasing Company, with reference to the purchase, had not been in strict accordance with their own deed, still if the contract with the other Company was the means of the purchasing Company coming into existence, they could not act in contravention of that contract.

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and was completely registered on the 22nd of *April* in that year.

The deed of settlement provided that the business of the company should be in the first place mutually to insure against perils of the sea, fire, men of war, rovers, reprisals and all such other risks whatsoever, as the directors might think fit, the ships or vessels of the shareholders of the company; and also within certain specified limits to insure against the like perils and risks all ships, vessels and crafts, and also the goods, freights, merchandize, cargo and property whatsoever in or on board of the same, whether the property of shareholders of the company or otherwise; and also to advance to any person or persons whatever, whether a shareholder or shareholders or not, any sum or sums of money by way of loan, to be secured by mortgage upon any ship, vessel or craft; and generally to carry on commission business, and all other branches and departments of the above business of marine insurance and loans on ships, vessels or craft, or any of them, or in anywise connected therewith or incidental thereto.

The deed also provided that the directors should have full power, where the deed was silent or omitted to provide the requisite particulars, to conduct and manage the affairs of the company in the prosecution of the business of the same as thereinbefore defined, and to do such other acts, matters and things as might be requisite for effecting the objects or carrying on the business of the company, upon such terms and conditions as they should think expedient; and should also have power, with the sanction of a general meeting, but not otherwise, to apply for and obtain any letters-patent or act of Parliament for additional powers; and generally to act in

the direction, management and superintendence of all the concerns of the company, in such manner as they should think most conducive to the interest of the company, but subject nevertheless as to the whole of the aforesaid powers to the rules and restrictions imposed by the deed, and to a consent of a general meeting, where such consent was by the deed made necessary. There was, however, no clause empowering the directors to sell or transfer the business to any other company.

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The Port of *London* Company carried on the business of marine insurance till *October*, 1849, when the agreement in question was entered into for the sale of its business and goodwill to the Sea, Fire and Life Society, a company which was provisionally registered in *February* 1849, and completely registered on the 8th of *October* following. The deed of settlement of this company was executed on the 31st of *August* 1849, and contained the following provisions:—

“ 28. That, except the managing officer, who, whether a director or not, shall always be entitled to be present at the Board of Directors, no person not a director shall be present at any meeting of the directors; that three or more directors shall constitute a meeting, and shall be competent to exercise the several powers and authorities hereby conferred on the directors generally, or on the Board of Directors.

“ 31. That the directors shall cause the company forthwith to be completely registered under the Registration Act, and shall thereupon be entitled to all the powers and authorities conferred on the directors of a completely-registered company by the same act, but subject as hereinafter provided; and that in and about effecting the incorporation and registration of the company, they shall

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shall be authorized and empowered to liquidate and defray such preliminary expenses as may have been incurred prior to the complete registration thereof, not exceeding the sum of 1,000*l.*, which said sum of 1,000*l.*, or a lesser sum, shall be chargeable against the company, as paid out of the capital stock and corporate funds of the same; and also that the directors shall have, at any time after complete registration, full power and authority to purchase or lease, as may seem expedient, at such price and on such terms and conditions as may be lawfully imposed, the business of any other Fire, Life or Marine Insurance Company, and for that purpose to enter into and rescind or modify contracts and agreements in the name of the Sea, Fire and Life Assurance Society, as of the shareholders thereof.

“33. That the directors shall have full and absolute power, authority and discretion to conduct and manage and in and about conducting and managing the affairs and business of the company, and therein at any time after the complete registration of the company to prepare and issue, and cause to be prepared and issued, all such policies of assurance on such life or lives, and to grant such endowments, annuities and loans, and to purchase and sell such reversionary or other contingencies, interests, whether real or personal, and such interests in stock or in mortgage debts, or other personalty, legacies, probate bonds or annuities, and generally to do and engage in such other acts, transactions, matters and things in the line of the company's business.

“43. That the directors shall have full power and authority, where these presents are silent or omit to provide the requisite particulars, to conduct and manage the affairs of the company in the prosecution of the business of the same as hereinbefore defined, and shall in particular

cular be and they are hereby authorized to carry on all such branches of the aforesaid business, or otherwise, as they may think fit, and shall have power to do such other acts, matters and things as may be requisite for effecting the objects or carrying on the business of the company upon such terms and conditions as they shall think expedient" — (Then followed powers to fix the salaries of officers, and with the sanction of a general meeting to apply to Parliament for fresh powers), "and generally to act in the direction, management and superintendence of all the concerns of the company in such manner as they shall think most conducive to the interest of the company, but subject nevertheless, as to the whole of the aforesaid powers, to the rules and restrictions by these presents imposed, and to the consent of a general meeting where such consent by these presents is made necessary, and subject also to any restrictions hereafter to be imposed by any general meeting, ordinary or extraordinary, pursuant to the powers hereinbefore given to such meetings."

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Some of the directors of the company were also directors of the Port of *London* Company, and both Companies had the same managing director, Mr. *Collingridge*.

The sale in question was effected by a deed of assignment, dated the 11th of *October* 1849, and made between the Port of *London* Company of the one part, and the Sea, Fire and Life Assurance Society of the other part. This deed recited as follows:—

"Whereas the said Port of *London* Ship Owners' Loan and Assurance Company have for some time past carried on the trade or business of general marine insurance, and are at the date hereof engaged in the same trade and dealing; and in consideration of the covenant of the

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the said Sea, Fire and Life Assurance Society hereinafter contained, the said Port of *London* Ship Owners' Loan and Assurance Company have agreed to sell, relinquish and assign unto and the Sea, Fire and Life Assurance Society have agreed to purchase the goodwill, benefit and property, trade and business of the said Port of *London* Ship Owners' Loan and Assurance Company; and accordingly the said companies or societies have agreed to enter into the covenants on their parts hereinafter contained for the purpose of effectuating such sale and purchase." By the operative part it was witnessed, that, in consideration of the covenant on the part of the latter company thereinafter contained, and for a nominal consideration, the Port of *London* Company assigned to the Sea, Fire and Life Assurance Society all that the trade or business of general marine assurance, and all other the trade or business (if any) of the Port of *London* Company, and the goodwill and capital, stock and book and other debts, and property and effects thereof respectively, and all benefit and advantage thereof respectively, and all books, papers and accounts of and relating to the same business respectively, with full power for the Sea, Fire and Life Assurance Society and their successors, in the name and as the attorney or attorneys of the Port of *London* Loan Company and their successors, to sue for and recover all and every sums and sum of money, property and effects thereby assigned, and to give effectual discharges for the same respectively; and the Port of *London* Company thereby, for themselves and their successors, covenanted with the Sea, Fire and Life Assurance Society and their successors, that the Port of *London* Company and their successors would by advertisement and circular letters, and by other practical means, forthwith give public notice of the transfer and assignment thereby made, and would not at any time thereafter carry on the business of marine insurance in any of its branches;

branches; and in consideration of the assignment and covenant thereinbefore contained on the part of the Port of *London* Company, the Sea, Fire and Life Assurance Society, for themselves and their successors, thereby covenanted with the Port of *London* Company that the Sea, Fire and Life Assurance Society and their successors would from time to time and at all times thereafter well and sufficiently save, defend and keep harmless and indemnified the Port of *London* Company and the past and present several shareholders thereof, and the estate and effects of such shareholders respectively, from and against all actions, suits, costs, charges, damages and expenses and consequences whatsoever, which then were or should or might thereafter be instituted, prosecuted, sustained or occasioned, or which the said last-mentioned Company, or any of the shareholders thereof, should be put unto for or by reason of any claim or demand, or claims or demands whatsoever, which then was or were or at any time or times thereafter should or might be made or set up upon or against the said last-mentioned Company, whether in respect of any policy of assurance and promissory or credit note respectively made and issued by them, or on any other account or pretence whatsoever.

Although the formal purchase was carried into effect by this deed, it was stated on behalf of the Respondents, that the contract for the purchase had been made as early as *February* 1849, before the Sea, Fire and Life Assurance Company had been registered or formed; and that in substance the transaction was not a sale, but an amalgamation of the two Companies, or rather the continuance of the Port of *London* Company under new conditions and under a new name.

The Sea, Fire and Life Assurance Company carried
on

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on business, including that purchased by them, as above mentioned, from *October* 1849 to *May* 1850.

On the 26th of *January* 1850, an order was made for winding up the Port of *London* Company; and on the 1st of *June* following, a similar order was made with respect to the Sea, Fire and Life Assurance Company.

On the 23rd of *November* 1853, the application now in question was made to the Master on behalf of the official manager of the Port of *London* Company, who claimed against the Sea, Fire and Life Assurance Company several sums amounting to 5,856*l.* 11*s.* 9*d.*, and also the costs, charges, damages and expenses thereafter to be sustained by the Port of *London* Company, or any shareholder thereof, in respect of any policy or promissory or credit notes made or issued by them or otherwise.

One part of the purchase deed was produced before the Master, to which the common seal of the Sea, Fire and Life Assurance Society was affixed, and which was executed by Mr. *Alexander Davis* and Sir *William Ogilvie*, two of the directors of that Company; but the other part of the deed, which was alleged to have been executed by the Port of *London* Company, had not been found among the papers of the Sea, Fire and Life Company.

Mr. *Thomas Francis Ashford*, who had been the accountant of the Port of *London* and Sea, Fire and Life Assurance Companies, was examined before the Master, and deposed that he became accountant to the Port of *London* Company about *April* or *May* 1847, and continued to act in that capacity until the breaking up of both the Companies. That on the 1st of *July* 1849,

1849, new books were opened, as the names were about to be changed in consequence of their taking up fire and life, as well as the marine department. That the witness had to transfer the account of one to the other, which he did. That in *July* 1849, the exchange took place; but that the complete registration of what might be called the new Company did not take place until *October* 1849. That when the new books were opened, the witness showed to the manager that the concern was hopelessly insolvent, and that what he wanted, as a man of business, to put in the Ledger, was never inserted in it, namely, a representation of the state of the Company's affairs. That the general business of the Company went on from *July* to *October*, and that all the monies were received by what was called the Sea, Fire Insurance Company. That the insolvency took place when the name was changed on the 1st of *July* 1849. That to the best of the witness's belief, some time previously policies were issued for the Sea, Fire and Life Assurance Company, although it was not registered or come legally into action. That after the alteration in the books on the 1st of *July* 1849, all the monies which were receivable on account of the existing policies were paid to the account of the Sea, Fire and Life Insurance Company. That from that time till the failure of the Sea, Fire and Life Company, whatever there was to receive was received by that Company. That some of the agents of the Sea, Fire and Life Company had business amounting to 200*l.* or 300*l.* a month. That these agents had previously done business with the Port of *London* Company, and afterwards transferred their business to the Sea, Fire and Life Company, and continued with that Company the business which they before did with the Port of *London* Company. That the directors of the one were the directors of the other. On cross-examination the witness said,

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said, he did not think that there was any meeting called of the Port of *London* Company, and that at all event there was nothing at all done in that way to his knowledge. He said that notices were given to the agent that the name of the Company would be changed. On the 1st of *July* 1849, he so far thought them the same Company, that he simply brought forward the balance from the old Ledgers. He said that the Port of *London* Company's books ended in *June* 1849, and that all the balances in the Port of *London* Company were transferred from the Port of *London* Company's books to the Sea, Fire and Life Company's books. He did not think that there was any notice given of the assignment of the business of the one Company to the other. He thought that it was all done between Mr. *Davis* and Mr. *Collingridge*; but that if he recollected, Sir *William Ogilvie* was also called in.

Mr. *Chappell*, who had been the solicitor to both the Companies, was also examined before the Master, and stated that he had prepared the deed of assignment in duplicate, and had handed both parts to Mr. *Collingridge* to be executed; the one by the Port of *London* Company, and the other by the Sea, Fire and Life Company. That the witness requested Mr. *Collingridge* to return the above-named part (which was produced to the witness) on behalf of the Port of *London* Company, and to retain the other on behalf of the Sea, Fire and Life Company. That the one now produced had been accordingly returned to the witness, but that he had never seen the other since he parted with it to Mr. *Collingridge*, as above mentioned.

The Master having disallowed the claim, the official manager of the Port of *London* Company appealed first to the Vice-Chancellor *Stuart*, and then to this Court.

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Mr. Selwyn and Mr. H. Stevens, in support of the Appeal.

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The grounds of the rejection of the claim were:— That the execution of the deed by the Port of London Company was not proved; that the sale was beyond the powers of the directors of that Company, and that the purchase was not effected according to the provisions of the Sea, Fire and Life Assurance Company, there not having been, as was alleged, a meeting of the proper number of directors, or proper resolutions passed for that purpose. These grounds, we submit, are unsustainable. As to the first we produce the counterpart of the deed executed by the Sea, Fire and Life Company; and they, having had the enjoyment of the property, cannot, because they are unable to find their purchase deed, deny the execution of it by the vendors. With regard to the right of the Port of London Company to sell their business, it is much too late to question that, after the purchasers have had the full benefit of their purchase. It is as if the purchaser of a leasehold should, after the expiration of the term and undisturbed enjoyment, refuse to pay the purchase money, on the ground that a good title had not been shown. [The LORD JUSTICE KNIGHT BRUCE referred to a case put by way of illustration during the argument in *Page v. Broom* (a), by the then Lord Chancellor, of returning a coat to a tailor after it had been worn.] Here the coat has not only been worn, but is worn out, and the customer comes here in the tatters, refusing to pay for it. As to the last ground relied upon, it is not incumbent on the vendors to show that all the formalities preliminary to the affixing of the seal of the Sea, Fire and Life Company were gone through. The impress of the seal was sufficient evidence to the vendors

(a) Reported 2 Russ. & Myl. 214, and 4 Cl. & Fin. 399, where, however, this is not noticed.

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vendors of its having been properly affixed in the absence of notice to the contrary. The 31st, 33rd and 43rd clauses of the deed of settlement were sufficient to authorize the transaction. Moreover, the Sea, Fire and Life Company came into existence entirely by means of the purchase from the Port of *London* Company; and a bargain made by the promoters of a Company, by means of which the Company comes into existence, is binding on it when constituted; *Edwards v. Grand Junction Railway Company* (a).

They also referred to and commented on *Meux's Executors' case* (b), *Crosfield's case* (c), *Clarke v. Imperial Gas Light Company* (d), *Hill v. Manchester and Salford Waterworks Company* (e).

Mr. *Bacon*, Mr. *Malins* and Mr. *Freeling*, for contributories of the Sea, Fire and Life Assurance Society.

The sale was a fraudulent one and cannot be supported, for the Port of *London* Company knew that they were in a state of insolvency at the time of the sale. But if this had not been so, still the sale was void, for the supposed vendors had no power to dispose of the business of their Company. On the other hand, neither had the supposed purchasers power to buy without the assent of the shareholders; and the Port of *London* Company dealing with the directors of the other Company with the knowledge that those directors were exceeding their powers, have no title to the purchase money; *Bryson v. Warwick and Birmingham Canal Company* (f), *Wilson v. Moore*

(a) 1 *Myl. & Cr.* 650.

(d) 4 *B. & Ad.* 315.

(b) 2 *De G., Mac. & Gor.* 522.

(e) 5 *B. & Ad.* 866.

(c) 2 *De G., Mac. & Gor.* 128;

(f) 4 *De G., Mac. & Gor.*

see *Burgett v. Shortridge, H. of* 711.

L. Ca., not yet published.

Moore (a), *Carew's case* (b). In *Hill v. Manchester and Salford Waterworks Company* (c), it was laid down that a deed executed by a Company in a manner not warranted by the enactments enabling the Company to execute such an instrument, was not in point of law executed at all. Now the Joint-Stock Companies Registration Act provides (d) that the directors shall conduct and manage the affairs of the Company according to the provisions and subject to the restrictions of that Act and of the deed of settlement. The latter here required the presence of three directors. It is true that the 44th section of the Act (e) provides that less than two directors shall not be sufficient, but it does not say that that number shall be sufficient if the deed requires more.

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Mr. *Wigram* and Mr. *Roxburgh* were for the official manager of the Sea, Fire and Life Assurance Society.

Mr.

(a) 1 *Myl. & K.* 126, 337.

(b) *Ante*, p. 94.

(c) 5 *B. & Ad.* 866.

(d) Sect. 27.

(e) 7 & 8 *Vict.* c. 110, s. 44.

And for the purpose of regulating contracts entered into on behalf of any Joint Stock Company completely registered under this Act (except contracts for the purchase of any article, the payment or consideration for which doth not exceed the sum of 50*l.*, or for any service the period of which doth not exceed six months, and the consideration for which doth not exceed 50*l.*, and except bills of exchange and promissory notes), be it enacted, that every

such contract shall be in writing, and signed by two at least of the directors of the Company on whose behalf the same shall be entered into, and shall be sealed with the common seal thereof, or signed by some officer of the Company on its behalf, to be thereunto expressly authorized by some minute or resolution of the board of directors applying to the particular case, and that in the absence of such requisites, or of any of them, any such contract shall be void and ineffectual (except as against the Company on whose behalf the same shall have been made).

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Mr. *Selwyn*, in reply.

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Judgment reserv ◀

June 13.

The LORD JUSTICE KNIGHT BRUCE.

In this case there is no ground for any imputation of fraud. The instrument, on which the Appellant's claim rests, is a deed under the common seal of the Sea, Fire and Life Insurance Company; and the facts in proof render it unnecessary to determine whether the common seal of the Port of *London* Company was affixed to the counterpart or duplicate of the deed, or whether the directors of the Port of *London* Company exceeded their powers in agreeing to the transaction forming the ground-work of the contest—a transaction which, intended to be completed on the part of the Sea, Fire and Life Insurance Company by the deed, was certainly approved, adopted and accepted by the directors of the Port of *London* Company, nor has been on behalf of the Port of *London* Company dissented from.

The questions, therefore, for our decision are at most these three:—First, Is it proved that more than two of the directors of the Sea, Fire and Life Insurance Company sanctioned that transaction, and particularly the deed of 11 *October* 1849? Secondly, Is it proved or can be inferred that they did so in the form and manner required by the deed constituting and regulating the Company? Thirdly, Was the transaction, that (as I have said) the deed of 11 *October* 1849 was intended to complete, the basis, or in part the basis, of the Sea, Fire and Life Insurance Company—the foundation, or in part the foundation, upon which it was constructed—the cause or one cause, without which it would not have been.

Up

Upon the materials before the Court—materials to be now, I think, properly treated as all that are capable of being usefully brought to bear on this controversy—I am of opinion that each of the three questions ought to be answered in the affirmative, although less would suffice to support the appeal, since if, on the two first, the Appellant is right, the third is superfluous; and if on that he is right, the two others are perhaps not important. The facts established are sufficient to raise a presumption in his favour, where direct evidence is wanting, especially as some of the books and documents of the Sea, Fire and Life Insurance Company are not producible, or at least not produced: while the Respondents' case seems to me nothing but surmise against fact—nothing but an endeavour to show that presumption ought to be against the side, in favour of which, according to technical rules equally and those of reason, a Court of Justice ought to presume.

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My opinion, I repeat, is with the Appellant; as to which I should possibly have felt more difficulty had I been sure what were the grounds on which the Master or the Vice-Chancellor proceeded in deciding against him.

The LORD JUSTICE TURNER.

I am sorry to be under the necessity of differing both from the Master and the Vice-Chancellor in this case, but my opinion upon the case entirely agrees with that of my learned brother. The transaction between the two Companies may be considered in two points of view, either as having been completed by the assignment, or as having rested in contract. The most favourable view to the Respondents is to consider the transaction as having rested in contract, and I shall deal with it accordingly.

It

The deed of assignment, even if it is not valid assignment (a question with which in the view I am considering I do not deal), must, I think, be evidence of the Company, being executed according to the provisions of the statute; and the deed of assignment recites a contract. But, independently of the deed, it is clear that the Sea, Fire and Life Company took all the books and accounts of the Port of London Company, and must have been a contract to authorize this to be done, and, that it was part of the contract that they indemnify the Port of London Company, is apparent from this circumstance, that they went on paying the debts and liabilities of the Port of London Company and made no claim against that Company in respect of payment.

It was said, however, that there were not the directors of the Sea, Fire Company parties to the contract, so as to render it binding on that Company; but the deed of assignment is executed by *Davis* and *O*, two of their directors, and it is clear that *Colling*, another of the directors, was party to the transaction. There is, besides, in evidence, a regular notice of meeting of directors before the execution of the deed, and the evidence of *Ashford*, which was so much relied upon the part of the Respondents to prove that

----- meeting of directors seems to me to prove that

shareholders called?" he says, "I do not think there was anything at all done in that way, there was not to my knowledge. Notices were given to the agents that the name would be changed." But this answer has reference to a meeting, not of the directors of the Sea, Fire Company, but of the Port of *London* Company. When the witness, however, is asked, "Was there any notice given to you of the assignment of the one business of the one Company to the other?" he says, "I do not think there was. I think it was all done between *Davis* and *Collingridge*; and, if I recollect, Sir *William Ogilvie* was called in." So that it appears upon the evidence that not only were *Davis* and *Collingridge* parties to the transfer, but that Sir *William Ogilvie* was called in, and that there were, therefore, three directors deciding upon this question.

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Upon these facts I feel no doubt that there was a sufficient contract by the Sea, Fire Company; and I may add, that, where a purchaser has taken possession of and enjoyed the subject matter of a contract, it is, in my opinion, the duty of this Court to make every reasonable presumption in favour of the validity of the contract.

Failing in their case for establishing the non-existence of contract, the Respondents insisted that the contract, if existing, would be liable to impeachment for fraud. It was said that the Port of *London* Company was utterly insolvent, but I have yet to learn that the good-will of the business of an insolvent company is of no value. But then it was said that there was no good-will at the time of the assignment; but, if there was no good-will, then it was only because the Sea, Fire Company had already taken possession. The case of fraud set up, on these and other grounds, seems to me entirely to fail,

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CASE.

and I am of opinion, therefore, that this claim, the amount of which I do not understand to be disputed, must be admitted.



CHAFFERS v. BAKER.

June 15.

Before The
LORDS JUSTICES.

Every day in term is a motion day; and therefore under the 79th Order of May 1845, notice in the Gazette of a motion to be made on any day in term, to take a bill pro confesso, is good.

MR. C. P. COOPER applied to their Lordships with the sanction of Vice-Chancellor *Kindersley* for an order to take a bill pro confesso under the 79th Order of May 1845, which is as follows:—"Where any Defendant who, under Order 77, may be deemed to have absconded to avoid, or to have refused to obey the process of the Court, has had an appearance entered for him under Orders 29, 31 or 32, and has not afterwards appeared in person or by his own solicitor, the Plaintiff may cause to be inserted in the *London Gazette* a notice that, on a day in such notice named (being not less than four weeks after the first insertion of such notice in the *London Gazette*), the Court will be moved that the bill may be taken pro confesso against such Defendant; and the Plaintiff is upon the hearing of such motion to satisfy the Court that such Defendant ought, under the provisions of Order 77, to be deemed to have absconded or avoided, or to have refused to obey the process of the Court, and that such notice of motion has been inserted in the *London Gazette* at least once in every week, from the time of the first insertion thereof up to the time for which the said notice is given; and the Court, being so satisfied and the answer not having been filed, may, if it so think fit, order the bill to be taken pro confesso against such Defendant, either immediately, or at such time, or upon such

such further notice, as under the circumstances of the case the Court may think proper."

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In conformity with this order the Plaintiff caused to be inserted in the *London Gazette* the requisite notice of a motion to be made before Vice-Chancellor *Kindersley* on the 14th day of *June*, that the bill might be taken pro confesso against two of the Defendants; but the Vice-Chancellor having some doubt whether the notice was sufficient on account of the 14th of *June* not being a day appointed for hearing motions, requested that the matter might be mentioned to their Lordships.

The LORD JUSTICE KNIGHT BRUCE.

Every day in term is a motion day. Perhaps, properly speaking, there is no such thing as a "seal day" in term. If the motion is correct in other respects, I think that the order should be made.

The LORD JUSTICE TURNER concurred.

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In the Matter of The LONDON and BIRMINGHAM EXTENSION and NORTHAMPTON, DAVENTRY, LEAMINGTON and WARWICK RAILWAY COMPANY,

AND

In the Matter of The JOINT-STOCK COMPANIES ACTS, 1848 and 1849.

PRICHARD'S CASE.

June 28.

Before The
LORDS JUSTICES.

By the subscription contract of a provisionally registered Railway Company the managing committee were empowered to appoint engineers, and to enter into any contracts for making the proper surveys, and taking all necessary measures with a view to the application to

THIS was an appeal from the refusal of Vice-chancellor *Stuart* to make any order on a motion on behalf of the Appellant *William Bromley Parker*, that the Appellant might be at liberty, notwithstanding an order made by the late Vice-Chancellor Sir *Parker*, and dated the 10th of *February* 1852, such proceedings at law or in equity as he might advise, on a judgment obtained by the Appellant the official manager of the Company in an action by the Court; or, in the alternative, that the manager might be directed to take all necessary measures for paying and satisfying out of the assets of the Company or the credits thereof, or by calls to be made on the contributories, the amount of the judgment debt.

A.

Parliament for carrying the project into effect, and the subscribers covenanted that in the event of the application to Parliament being unsuccessful, they would discharge all the costs and expenses which should have been incurred with a view to the promotion of the undertaking.

The application to Parliament failed, the Company was ordered to be wound up, and an engineer employed by the committee tendered a proof against the Company under the winding-up order.

Held, that the debt (if any) was one due from the Company, provable under the winding-up order, and an action having been brought under the direction of the Court to determine the amount due, the official manager was directed to admit that the debt was due from the Company.

Held, also, that on the official manager failing to obtain funds under the winding-up order to meet the demand, the creditor was entitled to proceed at law on the judgment so obtained, and leave was, on appeal, given for that purpose.

Appellant and the costs incurred in the applications made by him to the Master and to the Vice-Chancellor, as well as of the present application.

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The circumstances relating to the formation of the above Company, and under which the debt claimed by the Appellant are stated in *Gay's Case*, reported in the 5th volume of Messrs. *De Gex & Smale's Reports*, page 122, and ante, Vol. I. page 347, and were shortly these:—

The Company was projected in the year 1845, and had for its object the formation of a railway to connect *Warwick, Northampton* and other towns. A large number of shares were issued and taken, and the deposits paid amounted to upwards of 18,000*l.* In the month of *August* 1845, a subscription contract was executed, whereby the persons parties thereto of the third part, who were subscribers to the undertaking for the numbers of shares set opposite their names in a schedule to the deed, nominated a managing committee for the purpose of carrying the undertaking into effect, and for making the requisite application to Parliament, with power to appoint bankers, engineers, surveyors, clerks and other persons, and to pay them such salaries as the committee might deem right, and to enter into any contracts for making the proper surveys, and taking all the measures with a view to the application to Parliament for carrying the project into effect, and to apply the monies which might be paid as deposits in the discharge of the expenses which might be incurred. And all the parties to the deed thereby undertook and agreed, that, in the event of the intended application to Parliament not being successful, they would bear, pay, allow and discharge all the costs and expenses which should have been incurred, either previously to or after the execution of the deed, in and about or with a view to the establishment or promotion of

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of the undertaking, or in or about the making, obtaining or completing of any surveys or estimates for the said railway, branches and works, or any of them, or or account of any solicitor's charges, counsel's fees; and also the costs of or incidental to the preparing, applying for, soliciting or procuring any such Act as aforesaid travelling expenses and all other costs and charges of every description incidental or preparatory to the proposed undertaking; all such expenses, costs and charge to be computed and assessed rateably on the sum or sum respectively subscribed by each of the said several persons, parties to the deed.

In the year 1845 the Appellant was engaged by the committee of management to act, and accordingly acted as the engineer of the Company.

The Company did not succeed in obtaining an Act of Parliament, and an order was, on the 26th of *May* 1849 made directing the Company to be wound up under the Winding-up Act.

On the 16th of *November* 1850, the Appellant carried in before the Master a claim for 4,551*l.* 9*s.* 8*d.*, supported by an affidavit; but the Master, by his certificate dated the 22nd of *February* 1851, allowed the demand as a claim only.

Mr. *Prichard* appealed to the Vice-Chancellor *Knigh Bruce*, who held, that under the powers of the deed the committee of management had, on behalf of the contributors who had executed or acceded to the deed power to appoint an engineer, and had appointed the Appellant to be such engineer. His Honor made the following order:—

“Declar

"Declare that the debt, if any due to Mr. *Prichard*, for work and labour done and performed and money laid out and expended by him as engineer, by and under the employment of the committee of management, in exercise of the duties of such committee under the indenture of settlement of the 16th of *August* 1845, forms a debt due from that Company, proveable under the order of the 28th of *May* 1849 (the order to wind up the Company), and with this declaration refer it back to the Master" (a).

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By two orders, dated the 21st of *March* 1851, and the 24th of *January* 1852, the Master directed that the Appellant should bring an action in the Court of Common Pleas against *Henry Croysdill*, the official manager of the Company, for the recovery of the debt alleged by the Appellant to be due to him from the Company for work and labour done and performed and money laid out and expended by him, upon the employment of the general committee of management, in the due exercise of the duties of such committee under the indenture of the 16th of *August* 1845, or such part of such alleged debt as he the Appellant might be advised. And the Master further directed, that on the trial of such action the official manager should admit that the debt (if any) due to the Appellant, as thereafter mentioned, formed a debt due from the Company; and he further directed, that the application of the Appellant to prove the alleged debt before him should stand over to abide the result of the action at law.

On the 10th of *February* 1852, an Appeal from this order was brought by the official manager, and heard by Sir *James Parker*, who, in giving judgment, said—

"I do not feel very much doubt in this case. The
Winding-up

(a) See 4 *D. G. & S.* 330.

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Winding-up Act contemplates two totally different mode of proceeding on behalf of a creditor. One is, that he shall bring his action and make what he can of his legal right; and the only restraint is that which is imposed by the 73rd section, which requires that he shall not bring his action until after he has exhibited or made such proof of his debt or demand as he may be able to before the Master. When he has taken that step, he is perfectly free to go on with his action, which he brings according to the course of the Court in which it is brought, each party being unfettered by any admissions and the action not being brought under the direction of this Court. That is one way of proceeding. Another way is, that the creditor comes in and makes proof of his debt as under a bankruptcy. He submits to the jurisdiction of this Court, under the Winding-up Act and after the Court has ascertained the amount of his debt, the Master may allow or disallow it, or allow it as a claim only,—and a subsequent section provides for the way in which that debt is to be paid;—first out of the assets of the Company, and then by means of calls upon different contributories. Then the 91st section, in order to give this Court the aid of proceedings at law for the purpose of ascertaining whether the debt is or not a debt which ought to be paid under the Winding-up Act, gives the Master power to direct issues, or to direct actions to be brought under the control of this Court. When the creditor comes in thus to make proof and establish his debt, and does so by means of proceedings at law under the direction and control of the Court, the result of the judgment is not to give him any personal right against the contributories at all. He can only get payment by means of administration in this Court. Now let us see what is the proceeding which has been taken in this case on behalf of Mr. *Prichard*. He moved the Court on the 13th of *March* 1851, that. [His Honor read the terms

of the notice of motion.] That is all to enable Mr. *Prichard* to come into this Court and receive satisfaction of his debt by way of payment out of the assets of the Company, and it is not in the least aimed at enabling Mr. *Prichard* as an adverse creditor to come into this Court and make what he can of his legal rights, and to enable him to prosecute his legal rights. Reviewing what had taken place before the Master, the Court declared that the debt (if any) was due from the Company, and proveable under the order for winding up the Company. The matter then went back to the Master to ascertain what should be done upon that. Mr. *Prichard* went before the Master on the 21st of March, and applied for liberty to prove the debt due from the Company, pursuant to the order of his Honor Vice-Chancellor *Knight Bruce* made in this matter, upon the application of Mr. *Prichard*. Upon hearing that application, the Master directed that Mr. *Prichard* should bring an action at law in the Court of Common Pleas for the recovery of the debt which he alleged to be due to him for work and labour upon the employment of the General Committee; and it was ordered that upon the trial of that action the official manager should admit that the debt, if any due to Mr. *Prichard*, as before mentioned, formed a debt due from the Company. The Master further ordered that the application of Mr. *Prichard* to prove his debt before the Master should abide the result of the action at law. From that it appears conclusively that the action is an action under the provisions of the 91st section, for the purpose of ascertaining what is the quantum of Mr. *Prichard's* demand, and for the purpose of giving him payment of it under the Winding-up Act. It appears to me that the Master was perfectly right in directing that that admission should be given, because it had been established under the winding-up order that this debt (if it existed

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at all) was a debt of which Mr. *Prichard* was entitled to receive a payment in the winding up of this Company. Now it is extremely likely, I think, that according to the true construction of the Master's order, this Court would not allow Mr. *Prichard* (even if there was a qualification of the order), after having got judgment in the action, which has been brought under the control of the Court in that way, to use it for another purpose, namely, for the purpose of enforcing personal demands against the members of the Company. This Court would not, I think, allow that, as it would see that the question to be tried in that action would be a totally different question from the question which would have been tried if Mr. *Prichard* had simply sought to enforce his liability against the parties personally without the assistance of this Court. But I do not think this a matter which ought to be left in doubt. When this Court directs an action to be brought with admissions, it means that such an action is begun under the control of this Court, and shall continue under the same control. I think it is the habit of the Court to express that no execution shall issue on the judgment in such an action without the leave of the Court; and, with that addition, it appears to me that the Master's order is perfectly right."

An order was thereupon made that the Master's order of the 29th of *March* 1851 should be varied, by adding thereto a direction, that, in case *William B. Prichard*, should obtain judgment against the official manager in the action in the order mentioned, such judgment was not to be dealt with in any manner by *William B. Prichard* except with the leave of the Court.

The action was proceeded with, and an order was made at Nisi Prius on the 2nd of *February* 1852, referring

ferring all matters in dispute in the cause to the arbitration of *Henry S. Keating, Esq.*

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The arbitrator having on the 7th *December* 1853 made his award in the Appellant's favour for 3,538*l.*, final judgment was signed on the 20th of *January* 1854 against the official manager.

The Master by his certificate, dated the 16th of *December* 1853, admitted the Appellant as a creditor of the Company for the above amount, and also in respect of his costs incurred before the Court and before him in proving the debt; and the Taxing Master by his certificate, dated the 9th of *May* 1854, certified that he had taxed the costs at 196*l.*

The Appellant thereupon applied by his solicitors to the Master that directions might be given respecting payment and satisfaction of the amount thus appearing to be due to the Appellant by call or otherwise; but the Master by his certificate, dated the 11th of *May*, refused the application.

The motion was then made before the Vice-Chancellor *Stuart*, from the refusal of which this Appeal was brought.

Mr. *Bacon* and Mr. *T. H. Terrell*, in support of the appeal.

By the winding-up order the Appellant was prevented from proceeding at law until he had applied to the Master under the winding-up order. Now the 57th and 58th sections of the Winding-up Act 1848, provide that the Act shall not alter or prejudice the rights of the creditors. The creditor, however, has been delayed by the proceedings under the order, and he must be placed in a position

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position to obtain the benefit of his demand. The only modes in which he can obtain it are by a call or by enforcing his judgment. Now he has no right to apply under the Act for a call, and therefore if the official manager will not apply for one, the Appellant must be set at liberty to proceed under his judgment.

They referred to and commented upon *Prescott v. Hadow* (a), *Thompson v. The Universal Salvage Company* (b), *Lloyd's Case* (c).

Mr. *Malins* and Mr. *Cole*, for Mr. *Gay* and other contributories.

The clauses of the Winding-up Act, relied upon on behalf of the Appellant, are adverse to his case; for independently of the order of this Court, the Appellant could not have recovered judgment at law against such an association as that in question. The admission that there was a Company which was indebted to the Appellant was a mere fiction, for the purpose of enabling the amount of the demand to be ascertained at law. This is clear from the language of Sir *James Parker's* judgment. [They read it from the short-hand note, to the purport above set out.] It would be most unjust to allow that fiction to be proceeded upon at law as if it were a reality, and would, in contravention of the Winding-up Act, be greatly enlarging the rights of this creditor.

Mr. *C. P. Cooper* and Mr. *De Gex* appeared for the official manager.

The LORD JUSTICE KNIGHT BRUCE.

It appears to me, as well as to my learned brother, that the

(a) 5 *Exch.* 727.

(b) 3 *Exch.* 310.

(c) 1 *Sim. N. S.* 248.

the necessary result of what has taken place is to entitle **Mr. Prichard** to one of two things, either to have a call made or to make what he can of his judgment at law against such persons as in a Court of Law would be considered liable upon the judgment. It would be improper, and discreditable to the administration of justice, if **Mr. Prichard** were to be precluded, not only from the benefit of a call, but also from the right to make his judgment available. I am not aware of any case in which a call has been made at the instance of a creditor by this Court in the first instance; and the present application cannot be considered as an appeal from the Master on the subject of a call. I do not dissent from the decision of *Sir James Parker*, which was no doubt right when it was made; but I think that the restraint which he put upon the Appellant's proceeding at law should now be taken off. Any contributory, however, is at liberty to apply to the Master to make a call, and if the Master shall think fit, we wish him to consider himself at full liberty to do so. If the Master shall in his discretion make a call, any person interested will be at liberty to ask this Court to suspend the proceedings of **Mr. Prichard** at law; and this order is to be considered as subject to any application that may be made by reason of any such call.

The LORD JUSTICE TURNER.

This case was before the Master, and on motion before the Vice-Chancellor; and we have now to decide whether **Mr. Prichard** should be allowed to proceed at law, and to issue execution on the judgment which he has obtained. It has been said that he ought not to proceed on his judgment, because it was obtained in an action directed by the Court to be brought; but the action was directed for the purpose of ascertaining the amount of
the

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the debt, it being settled that the debt, if any, was a debt due from the Company; and it seems to me to follow, that, the debt being a debt against the Company, there must be a right to recover it.

It was contended that Mr. *Gay* and the other Respondents represented by Mr. *Malins* were not liable to this debt, and that the restriction, if removed against the other contributories, should not be removed as against them; but it is no part of the duty of this Court, on the present application, to answer the question whether any particular section of contributories is liable to this particular debt. It was not the object of the Acts to alter the rights of creditors; and this creditor has a right to proceed at law against all the contributories. The Court will make no order as to a call, as the application must originate in the Master's office; but Mr. *Prichard* is to be at liberty to go on at law notwithstanding the order of the Vice-Chancellor, and to be at liberty to proceed against the property of the Company, as he shall be advised.

NOTE.—The leave thus given was proceeded upon, and a rule obtained in the Court of Common Pleas against one of the directors, Mr. *Weiss*, to show cause why execution should not issue against him. The rule was, however, after argument discharged. *In re Weiss*, 15 Com. B. 331.

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In the Matter of The WARWICK and WORCESTER RAILWAY COMPANY

AND

In the Matter of the JOINT-STOCK COMPANIES WINDING-UP ACTS 1848 and 1849.

PRICHARD'S CASE.

THIS was an Appeal from the refusal of Vice-Chancellor *Stuart* to vary an order or certificate of the Master charged with winding up the above Company, dated the 9th of *March* 1854, whereby the Master certified that the Appellant *William Bromley Prichard* had come in before him and demanded a debt of 4,363*l.* 10*s.* and interest as due to him from the Company, and whereby the Master further certified that he had allowed the said demand as a claim only, and that the Appellant having applied to him that he might be at liberty to prove his demand as a debt against the Company, and having offered to produce evidence before him in support thereof, he certified that he had not at present thought fit to comply with such application, or to receive such evidence.

In support of the Appeal to the Vice-Chancellor from the above certificate, the Appellant made an affidavit to the following effect:—

The Company was formed in *August* 1845, for the construction of a railway from *Warwick* to *Worcester*, with a branch to *Droitwich*; and the committee of management retained and employed the Appellant to act, and

July 6.

Before *The*
LORDS JUSTICES.

Where a person claimed to be a creditor of a provisionally registered Railway Company ordered to be wound up under the Winding-up Acts:—*Held*, that he was entitled to adduce before the Master such proofs as he had in support of his demand, and to have the Master's judgment whether upon such proofs it ought to be admitted as a claim only, or as a proof, although no list of contributories had been settled.

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and that he accordingly acted as engineer of the Company, and in making the surveys, plans and sections of the line.

The orders for such surveys, plans and sections were comprised in resolutions (amongst others) duly passed at meetings of the committee of management on the 26th of *September* and the 13th of *October* 1845, which were as follows:—

“Resolved, that Mr. *Prichard* do proceed with the survey from *Warwick* to *Worcester*.”

“Resolved, that Mr. *Prichard* have directions to survey the *Droitwich* Branch.”

In pursuance of these resolutions and of the general directions of the committee of management, the Appellant made the survey, plans and sections, and deposited the necessary plans for Parliament, and received from the committee of management some portion of his account for such services.

The Company was unsuccessful, and was ordered to be dissolved and wound up by an order of the Vice-Chancellor *Knight Bruce*, dated the 26th of *May* 18—

On the 6th of *March* 1849, the creditors of the Company were required by advertisement to come in to prove their debts before the Master. Some time in the course of the same month of *June* 1849, *Henry Er* was appointed the official manager of the Company. The Appellant's affidavit of claim against the Company was filed in the Master's Office on the 12th of *November* 18—

The Appellant also deposed that he had been informed

and believed there was a sum of 8,967*l.* 7*s.* 6*d.* in Court to the credit of a cause of *Goodman v. De Beauvoir*, which, with accumulations of interest thereon, amounted to a sum of 14,000*l.* or thereabouts, and that such money was the property of the subscribers of the Company, and was applicable to the payment of the debts, liabilities and expenses of the Company; that he was informed and believed that the only obstacle to the application of such fund to the discharge of the debts and expenses of the Company, and the winding up thereof by the official manager of the Company, was a disputed claim made by Mr. *Pell*; that he was informed and believed that Mr. *Pell* would be willing to liberate the rest of the fund, on a sufficient part thereof being set aside or remaining in Court to meet his claim, but that the official manager had not made any efforts to effect such or any other arrangement in relation thereto, or taken steps to prosecute the question of the validity of such claim in a vigorous manner, or with a view to a speedy settlement thereof; that, as the deponent was informed and believed, the official manager had not yet settled the list of contributories of the Company, but that had proper steps been taken by him for that purpose, the same might have been long since completed.

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The motion before the Vice-Chancellor was that the above certificate might be discharged, and that it might be declared that the Appellant was a creditor of the Company within the meaning of the Winding-up Acts, 1848 and 1849, for the amount of his demand, or so much thereof as might be due to him; and that the Master might be directed to admit the Appellant as such creditor as aforesaid to proof against the Company of the said demand, or so much thereof as might be ascertained to be due to him; and that it might be referred back to the Master to ascertain the amount due to the

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Appellant in respect of such demand as such creditor, that such directions might be given for ascertaining amount thereof, as the case might require; and that costs of the Appellant, of and occasioned by the proceedings in the Master's Office and of that application, may be taxed and paid to him by the official manager of said Company.

The Vice-Chancellor declined to make any order and the Appellant now renewed his motion by way of Appeal.

Mr. Bacon and Mr. T. H. Terrell, in support of Appeal.

By the 73rd section of the Winding-up Act of 1862 no creditor can sue a contributory of the Company until after exhibiting or making such proof as he may be required of his debt or demand before the Master. Then the 74th section provides that the creditors shall make proof by deposition or affidavit in the same manner as debts are allowed to be proved in bankruptcy; and the 75th section enacts, that the Master shall, upon proof made or offered and exhibited before him of the debts and demands due or claimed from or against the Company or any of them, either allow or disallow, or allow as claimed only, such debts and demands respectively, according to the nature of the case, and of the proofs adduced and exhibited before him. In order to obey this enactment it is necessary that the evidence should be gone into, as so the House of Lords held in *Terrell v. Hutton* (a).

Mr. Malins and Mr. Roxburgh, for the official manager.

The 75th section must be construed consistently with the 58th, which enacts, that, except as is by the Act expressly

(a) 4 H. of L. Cas. 1092.

expressly provided, nothing contained in the Act shall extend or enlarge, diminish, prejudice or otherwise affect the rights or remedies of creditors. Now here there was no debt due from the Company, for there was no Company capable of contracting a debt; *Lloyd's Case* (a), and debts due from the Company can alone be proved (b). If any person who thinks fit to make a claim against the Company is entitled to call on the Master to investigate his claim, notwithstanding a fatal preliminary objection, the contributories would be exposed to great expenses, as the Act does not enable the Master to give costs against the claimant.

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They also referred to *Re Norwich Yarn Company*, as reported in the Law Journal, Vol. 21, N. S. (Chancery), 822 (c), and the dicta attributed to the Lords Justices in the note to that report.

The LORD JUSTICE KNIGHT BRUCE.

In this case a gentleman claiming to be a creditor of a Company or Association directed to be, as it is called, wound up under the name of the *Warwick and Worcester Railway Company*, went before the Master under the 73rd, 74th and 75th sections of the Act called the Winding-up Act, alleging and seeking to prove that he had a debt against the Company. He made an affidavit of debt, and in addition to his affidavit alleged before the Master that he had further evidence to adduce, and desired

(a) 1 Sim. N. S. 248.

(b) *Wright's Case*, 2 De G., M. & G. 636.

(c) This case was not reported in these reports, having been considered as deciding no new points, and having terminated in a compromise; but as it has since been

referred to, and as it contained an expression of the opinion of the Lords Justices as to the proper form of the order, a short report of it is subjoined from the notes taken by one of the present reporters at the time.

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sired an opportunity of adducing it. The Master, however, declined to receive any further proof of the demand than would be sufficient to support it as a claim. He did not postpone or adjourn the matter on the ground that a list of contributories had not then been made out, or on any other ground, but at once decided that he would not receive any further evidence. He admitted the demand as a claim, and this, it seems, without having the means of knowing whether it ought to be admitted as a claim or a debt. The alleged creditor is entitled to shew to the Court that it was reasonably possible he could produce such evidence before the Master as would satisfy him that the claimant was a creditor against the Company for the amount of his claim, and that, therefore, no legal proceedings would be requisite.

It is said that this Company is in so imperfect a condition as to be incapable of being indebted, as a Company. It is true that it may not be capable of being indebted, in the same way as a corporation, but it is possible that the members of the Association, directed to be wound up, are indebted jointly to Mr. *Prichard* and, if so, then, within the meaning which has been ascribed to the Act of Parliament and the order for winding up the Company, this is a Company indebted to him. I have before me the winding-up order of the 26th of May 1849, under which we are now exercising jurisdiction. That order directs the *Warwick and Worcester* Railway Company to be absolutely wound up, and directs a reference to Master *Wingfield* to wind up the Company, under the provisions of the Act. How, then, can we give effect to the argument that this is not a Company capable of having a debt? The word "Company" does not necessarily import a corporation; it imports association, and an association such as this was decided by the former Lord Chancellor to be liable to be wound up
und

nder the Act. Whether such a decision was convenient or inconvenient, beneficial or otherwise to the Queen's subjects, is a question with which we have now nothing to do, nor does it matter whether my own opinion was adverse to such a determination.

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The case of the *Norwich* Yarn Company has been referred to. That decision proceeded on the particular facts. But as it has been alluded to, I may say that the only report which I have seen of the case contains, in addition to the judgment, a statement of certain interlocutory observations supposed to have fallen from myself. It very seldom happens that it is beneficial to report interlocutory observations. They are generally made for the purpose of directing the attention of counsel to particular views of the controversy, and of obtaining from counsel information which the Court requires. And with regard to the *Norwich* case, it is not to be understood that I meant what fell from me in the course of the argument as declaratory of my opinion. The remarks ascribed to me are, I believe and am satisfied, stronger than those in fact made by me. Though of the intended accuracy of the report I have no doubt.

In the present instance, it was, in my opinion, upon a fair construction of the Act of Parliament in question, the right of the claimant to adduce before the Master all the evidence which he had bearing upon his demand, and to have it considered by the Master, with a view to guide the Master's judgment as to admitting the demand in the character of a claim or of a debt. The Master has not had before him the means of forming a judgment which of those two courses should be taken. I think that the certificate should be discharged and the case go back to the Master, with liberty to the claimant to tender such further

before the Master, and before the Vice-Chancellor, must be reserved.

The LORD JUSTICE TURNER.

I give no opinion upon the question, what may be of the existence or non-existence of a debt of a claimant. It may well be that if and when the claimant shall have proved a debt he may have no right to this Court to require a call to be made to pay its payment. His right may be to say, I will not pay it in law if the contributories do not apply to the debt or a call. That is not the question which we are to consider. The question is, whether the claimant has a right to have it ascertained whether he is entitled to be paid as a creditor or a claimant against the Company. If he is entitled to have it ascertained whether he is a creditor or does not stand as a creditor. The language of section 109 distinguishes between a claim and a debt. It says that the Master shall, upon proof made and exhibited before him of the debts and demands or claimed from or against the Company, or any other person, either allow or disallow, or allow as claims or debts and demands respectively, according to the merits of the case and of the proofs adduced or exhibited to him; and shall by writing under his hand decide

must ascertain what is the nature of the case and of the **proofs adduced** before him.

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It was attempted to escape from the terms of that **section** by saying that here there was in truth no **Company**; but it is impossible to say that, when there is an **order** in force for winding up this Association as a **Company**. Whether all the members of the Association are **liable** to Mr. *Prichard* is a question to be decided upon **the evidence**. The proofs will be gone into. The word "**Company**" in the order may perhaps render it **incumbent** on the Appellant to show that all the contributories **are liable** to him. That may be so, but the determination **will depend** upon the evidence.

Then it is said that the 75th section is cut down by **the words** of the 58th section providing that "nothing in **this Act** contained, nor any petition or order under the same for the dissolution and winding up, or for the winding up of any Company, shall extend or enlarge, **diminish, prejudice** or in anywise alter or affect the rights or remedies of creditors." The 58th section, however, **applies** to the rights of creditors as against the contributories. It does not say that the rights of contributories are not to be affected, or that they are not to be represented by others than themselves. The 37th section provides for the representation of classes of contributories by some of the number; and it is clear that the Act meant that in general all the contributories should be represented by the official manager.

It is said, however, that there are no contributories to this Company, because no list has been settled. That will, however, be done, and the Master will have to decide who are to contribute to the payment of the claims made against the Company.

I think

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I think that the Master was bound to go into the question of debt or no debt, inasmuch as it is absolutely necessary to ascertain that fact, for the purpose of bringing out the rights of the contributories. The provision of the act was introduced to enable the right contributories between themselves to be worked out; for this purpose it must be decided whether the here made is a debt or not.

The effect of the Act of Parliament may be that the Appellant has proved his debt against the Company; the Company may say, "We will not go to the question of trying the question of law with him, but will have the debt paid at once by a contribution;" for although the Appellant may have no right against the general contributories, another contributory may have a right, and the Appellant should enforce it against him. And as the Appellant may not be entitled to insist on a contribution made, a contributory may be so entitled.

We think that the Master ought to have received the evidence tendered, but it is not our intention to interfere with his discretion as to adjourning the proceedings.

1851.

In the Matter of the NORWICH YARN COMPANY,
AND
In the Matter of the JOINT-STOCK COMPANIES
WINDING-UP ACTS, 1848 and 1849.
EAST OF ENGLAND BANKING COMPANY'S
CASE (a).

Dec. 8, 9, 11.

THIS was the appeal of the East of *England* Banking Company against a decision of Lord *Langdale*, Master of the Rolls, reported in the 13th volume of Mr. *Beavan's* Reports (b).

Before The
LORDS JUSTICES, Lord
Justice KNOTT
BRUCE, and
Lord Justice
LORD CRAM-
WORTH.

The Appellants, the East of *England* Banking Company, claimed to be creditors of the *Norwich* Yarn Company (which had been ordered to be wound up under the Winding-up Acts) for 35,755*l*. The Master of the Rolls ordered the demand to stand as a claim, and directed the Appellants to bring an action against the official manager of the Company, and that the motion should stand over in the meantime.

Where a claim was made to prove a demand as a debt under the Winding-up Acts against a Company which was not authorized to be sued by any public officer, and the materials before the Court were not such as to enable it to decide upon the demand :—

Mr. *Bethell*, Mr. *R. Palmer*, Mr. *Cole* and Mr. *Willes*, in support of the Appeal.

This is not a case which can be decided by the result of an action. In the first place, the particular action directed to be brought will be wholly ineffectual. For the

Held, that it was competent to the Court under the Winding-up Acts to direct a claim merely to be admitted

(a) See *ante*, p. 499, note (c).

(b) Page 426.

until the claimants established their demand at law; but that for that purpose the claimants ought to have liberty to take such proceedings at law as they might be advised, and ought not to be directed to bring an action against the official manager.

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the Company directed to be wound up is not one which is authorized to be sued by any officer, and therefore cannot be sued under the Winding-up Acts by the official manager, the 50th section of the Winding-up Act not applying to such a case: *Beardshaw v. Lord Londesborough* (a). [The LORD JUSTICE LORD CRANWORTH Is not this demand, if sustainable at all, one on which all the members of the Company are liable? And if so cannot the Company be sued at law under the Act by an action against the official manager? Or is that a *casus omissus* in the Act?] We submit that the 50th section was not intended to apply to such a case. The consequences of holding the contrary to be the law would be very serious. For before these acts passed, execution could not be issued in such a case against a member of this Company, unless he was named as a defendant in the record, and had had an opportunity of defending himself in the action. And if the law should be held to be changed in this respect by the Winding-up Acts, individual shareholders will be deprived of the opportunity of being heard in their own defence, which, but for these acts, they would have had. Before the Winding-up Acts passed, it had been decided by the Court of Exchequer that where an Act of Parliament provides that actions, suits and proceedings against a Company "shall and lawfully may" be commenced, instituted and prosecuted against a public officer, the provision is imperative and not directory merely. In such a case it is a good plea to say that there is a public officer of the Company. *Steward v. Greaves* (b), *Chapman v. Milvain* (c). And therefore, if the official manager here could be sued, it would be a sufficient plea for any contributory to aver that the

(a) 11 C. B. 498. See also *Mac. & Gor.* 146.
Official Manager of Grand Trunk (b) 10 M. & W. 711.
Company v. Brodie, 3 De G., (c) 5 Exch. 61.

there was an official manager, a proposition which no one will maintain. But supposing an action could be brought against the official manager, and judgment were obtained, what remedy would there be to enforce the judgment? The 57th section enacts, that judgments entered up against the official manager shall have the like operation and effect against the property of the Company and the persons and property of the contributories, and shall be enforced in like manner, as if judgment had been entered up against the Company or against any person duly authorized to be sued on behalf of the same. Now the Company here would be held to mean those who were members at the date of the winding-up order, and thus persons would be made liable who, but for the Act, would not be liable.

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Not only, however, would the action which has been directed be ineffectual, but no other form of action will try the question. An action against all the members by name could produce no result. To direct such an action would be a denial of justice. The only remaining description of action, and the only one that could be reasonably advised would be an action against some one contributory. But such an action would determine nothing as to the liability of the Company. Each contributory would have his own case to set up.

[*The LORD JUSTICE KNIGHT BRUCE.* Is the point in dispute anything beyond this—whether there is a rational legal question to be tried? Is the claim of an alleged creditor dealt with under these orders otherwise than accidentally, and in a sense for the benefit of the contributories?]

The only mode of doing justice will be by allowing the claim to be disposed of by this Court. When an estate

joint debt against the estate of a predeceased although no action could be brought against his representative. It would overturn a large number of proofs that have been admitted in the Master's Court under the Winding-up Acts, if it were held that a demand could be admitted unless the demand could be proved at law against all the individuals (and against those who happened to be members of the Company) at the instant when the winding-up order was made. The 73rd, 74th and 75th sections of the Winding-up Act, 1848 give the creditors a right to prove, and the 76th enacts that the assets of the Company shall be applied in the most convenient manner and speed be applied by the official manager in the direction of the Master, in or towards the satisfaction of the debts or any of the debts of the Company in the manner as the Master shall direct.

[The LORD JUSTICE KNIGHT BRUCE. Does that mean that the Master may select some debts for payment?]

That is not (as we submit) the meaning of the Act. The money ought to be applied rateably in satisfaction of the debts proved. Moreover, the 90th section enacts that no action shall be directed with respect to the satisfaction of the debts between the Company or any contributory

They also referred to *Const v. Harris* (a), *Walter's second case* (b), *Morgan's case* (c), *Bagges' case* (d), *Bank of Australasia v. Breillat* (e), *Prichard's case* (f), *Upfill's case* (g), *Taylor v. Hughes* (h).

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Mr. Roupell, Mr. Walpole, Mr. Crompton and Mr. *Bush* were for the Respondents.

The LORD JUSTICE KNIGHT BRUCE.

The materials before the Court do not enable us to say with satisfaction to ourselves or with reasonable certainty of doing justice, whether this demand constitutes a proveable debt against the Company or not. We therefore think that the order directing the admission of a claim, and not a proof is correct. There remains for consideration only the question as to the manner of expressing the order with respect to legal proceedings. We think (subject to what the counsel for the Respondents may say) that it should not be expressed in this respect as it now stands, but that the Appellants should be at liberty to bring such action as they may be advised.

The LORD JUSTICE LORD CRANWORTH.

I entirely concur. If I were obliged now to decide the case, I should say that no claim was established; but I see enough to think it probable that a proof may eventually be made.

The case stood over, to be spoken to again with respect to the form of the order as to proceedings at law, and for the

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| (a) <i>T. & R.</i> 496. | (e) 6 <i>E. F. Moore</i> , 152. |
| (b) 3 <i>De G. & Sm.</i> 244. | (f) 4 <i>De G. & Sm.</i> 328. |
| (c) 1 <i>De G. & Sm.</i> 750; 1 <i>Mac. & Gor.</i> 225. | (g) 1 <i>Sim. N. S.</i> 395. |
| (d) 13 <i>Bess.</i> 162. | (h) 2 <i>Jo. & Lat.</i> 24. |

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the purpose of giving the parties an opportunity ranging between themselves whether there should issue or an action. On a subsequent day an order was made that the demand should be entered as a claim and that the Appellants should be at liberty, on or before the last day of Hilary Term, to bring such actions, and against such person or persons as they should be advised. Actions were accordingly brought, prosecuted, the case having been compromised (a)

(a) See 13 *Beav.* 432, note.

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Before The
LORDS JUSTICES.

Under a bequest (in the event of daughters dying without leaving issue) in trust for the persons who would, at the time of the decease of such daughters respectively, be entitled as next of kin, or otherwise, to the personal estate of such daughters respectively, under the statutes made for the distribution of intestate's effects: — *Held*, that the husbands of the daughters did not take.

MILNE v. GILBART.

THIS was the rehearing of a Petition originally filed by the Lord Justice Knight Bruce and Lord Justice Cranworth for Vice-Chancellor Sir James Parker on the 5th of August 1852.

The facts of the case, with the arguments and answers presented on that occasion, will be found reported ante p. 715.

Mr. *Elmsley* and Mr. *Hetherington*, in support of the Petition.

The husband takes under the words "who were next of kin at the time of the decease of such daughters respectively," be entitled as next of kin, or otherwise, to the personal estate of such daughters respectively, under the statutes made for the distribution of intestates' effects. No other construction would give any effect to the words "or otherwise;" for all persons who can claim under the statutes are included in the words "next of kin," whether the husband or wife of an intestate. The ground on which the Court came to its former decision was that

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husband was not entitled under the Statute of Distributions. He does, however, claim under that statute, as explained by the Statute of Frauds, and has in several cases, and even in Acts of Parliament, been treated as entitled under it. The testator or his advisers may well therefore have taken the same view, whether it be the absolutely correct one or not. In *Cart v. Rees* (which is cited by Lord *Cowper* in *Squib v. Wyn* (a)), a wife died possessed of choses in action, and the husband survived and died without taking out letters of administration to his wife, after which the next of kin of the wife administered to her; and Lord *Parker* held that the administrator of the wife was but a trustee for the executor of the husband, "the right to the wife's choses in action being by the Statute of Distributions vested in the husband as next of kin of the wife." And with reference to the proviso in the Statute of Frauds, that the Statute of Distributions shall not extend to the estates of feme coverts that die intestate, but that their husbands may have administration of their personal estate as before, Lord *Cowper*, in *Squib v. Wyn* (a), said, this clause was made in favour of the husband, and not to his prejudice; so that it was intended by the Parliament that the husband should be within the Statute of Distributions, so as to take the wife's choses in action as to his benefit, but should not be within the same as to his prejudice; and that this was not a new point, but had been settled, and upon very good reason; for were the construction to be otherwise, the husband of the wife intestate would be in a worse case than the next of kin, though ever so remote, which was not the intent of the statute. The Report goes on to say, "And there Mr. *Vernon* cited this case of Lady *Aiscough*, wherein he said Lord *Cowper's* opinion was the same with Lord *Parker's* (viz.), that

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(a) 1 P. Wms. 381.

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that the wife's choses in action did vest in the husband by the *Statute of Distributions*; so that since this resolution the right of administration follows the right to the estate, and ought, in case of the husband's death after the wife, to be granted to the next of kin of the husband in the same manner as it is granted to a residuary legatee." And in *Withy v. Mangles*(a), Lord Cottenham said, "The Appellant can only succeed by showing that the term 'next of kin' had by a technical and conventional construction obtained the meaning of 'those who could be entitled in case of intestacy under the *Statute of Distributions*.'" "To give such a construction to the words would be under the term 'next of kin' to include persons not of kin as well as husbands and wives." Lord Cottenham therefore considered that a husband or wife might be held entitled to shares on an intestacy under the *Statute of Distributions*. In *Brandon v. Brandon* (b), Sir Thomas Plumer said, "The word 'family' has for the same reason received the like construction, and with a like exception of the husband and wife, and therefore not precisely conformable to the provisions of the statute." Lord Hardwicke, in *Elliot v. Collier* (c), says, "Upon the equity of the *Statute of Distributions*, this Court makes an administrator de bonis non only a trustee for such part of the testator's personal estate as is undisposed of, for his next of kin; therefore I am of opinion the husband's representative is entitled to the wife's personal estate, and that it vested in the husband before the administration was taken out." But there are not only dicta of Judges in our favour, for the Act 1 Will. 4, c. 40, enacts as follows:—"Be it enacted, that when any person shall die after the 1st day of September next after the passing of this Act, having by his or

(a) 10 Cl. & Fin. 251.

(b) 3 Swanst. 321.

(c) 3 Atk. 528; 1 Ves. sen.

15; Wils. 168.

or her will, or any codicil or codicils thereto, appointed any person or persons to be his or her executor or executors, such executor or executors shall be deemed by Courts of Equity to be a trustee or trustees for the person or persons (if any) who would be entitled to the estate under the Statute of Distributions in respect of any residue not expressly disposed of, unless it shall appear by the will, or any codicil thereto, the person or persons so appointed executor or executors was or were intended to take such residue beneficially." It has never been held that these words excluded a husband or wife. Another instance of legislative interpretation occurs in the recent Lunacy Regulation Act (16 & 17 Vict. c. 70), which thus defines next of kin by the interpretation clause, for the purposes of the statute:—"The expression 'next of kin' shall be construed to refer to the next of kin of a lunatic; and to comprehend his heir or heirs at law, and also the person or persons who would be entitled to his estate, or to shares thereof, under the statutes for the distribution of the effects of intestates in case he were dead intestate." Has it ever been or can it be intended that a husband or wife was not intended to be within the Act? If the testator had intended to exclude husbands, the word "unmarried" would have been intended in the trust.

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Mr. Wigram and Mr. Goldsmid for some, and Mr. House for others, of the next of kin of Mrs. Eccles.

The words "or otherwise" are not superfluous in their strict sense, for persons take under the Statute of Distributions who are not next of kin, the persons to take described in the 6th section as "next of kin, or who legally represent them." Therefore there is reason for bringing within the description of a person and under the Statute of Distributions a husband title depends not at all on that statute.

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1854. They referred to *Watt v. Watt* (a), *Garrick v. Lord Camden* (b), *Bailey v. Wright* (c), *Cholmondeley v. Lord Ashburton* (d), *Kilner v. Leach* (e), and *Elmsley v. Young* (f).

MILNE
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Mr. *Elmsley*, in reply.

The LORD JUSTICE TURNER.

In this case I am of opinion that the only safe course is to abide by the words of the will. There are no other means of collecting what the intention of the testator may have been but by the words used in the will. Now the disposition we have here to consider is, in the events which have happened, that the fund is to go and belong to and be held in trust for the person or persons who were at the time of the decease of *Mrs. Eccles* entitled as next of kin or otherwise to her personal estate under the statutes made for the distribution of intestates' effects and in the same proportions and manner as they were entitled by virtue of such statutes. From that it appears therefore that every person, who is to take a benefit under the clause, must show himself qualified as a person entitled at the death of *Alice Elizabeth Eccles*, either as her "next of kin or otherwise, under the Statute of Distributions."

The question is, does or does not the husband qualify himself as entitled under the Statute of Distributions? Now it is plain, upon the face of the Statute of Distributions, 22 & 23 Car. 2, c. 10, that the statute does comprehend other persons than the next of kin of the intestates; for in the 6th section the expression is next of
kindred

(a) 3 Ves. 244.

(b) 14 Ves. 372.

(c) 18 Ves. 49.

(d) 6 Beav. 86.

(e) 10 Beav. 362.

(f) 2 Myl. & K. 780.

kindred, or those who legally represent them. There is therefore a perfectly clear and plain interpretation of every word of the description; and if the words "or otherwise" had been of more doubtful import and less open to explanation, there would still remain the question whether the husband could possibly come in without being a person entitled to take under the Statute of Distributions. The Statute of Distributions particularly excludes the idea of the husband taking under it. The difficulty which arose under the Statute of Distributions, and which was disposed of by the Statute of Frauds, was not whether the husband took any right under the Statute of Distributions, but whether that statute had not taken away the common law right of the husband. It was said, however, that in the earlier authorities upon this subject an interpretation has been put upon the word "next of kin" as used in the statute as entitling the husband; or at least that he was so treated in the earlier cases. With reference to this argument it is sufficient to refer to Lord *Eldon's* observation in *Garwick v. Lord Camden*, where he says, "Whatever may have dropped from judges, describing the husband as next of kin, or next legal friend of his wife, the tenor and bent of modern decision go to this, that if a husband bequeaths to his next of kin, that *primâ facie* does not include his wife; and it is quite clear that, if a married woman, under a power by settlement, bequeaths to her next of kin, it would be impossible to hold, that under the construction of such a will, without more, the husband would take as sole next of kin." Whatever may be the dicta in favour of the husband occurring in the earlier cases upon the subject, it appears to me that the whole course of the modern law upon the subject leads to a different conclusion.

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When the Statute of Distributions is represented the Statute of Frauds as expressly excluding the right of the husband, how can it possibly be said that he is a person entitled under that statute? Endeavouring to have done to exclude all bias from my mind arising from the previous decision of this Court upon the case, I entirely concur in it, and should have so decided had the case come before me originally. I think this petition should be dismissed with costs.

The LORD JUSTICE KNIGHT BRUCE.

The letter is against the husband, and the spirit is with him.

Petition of rehearing dismissed with costs

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SHERWIN v. SHAKSPEAR.

June 15.
July 15, 19.

THIS was an appeal from a decision of the Master of the Rolls, reported by Mr. Beavan (a).

Before The
LORDS JUSTICES.

The suit was instituted by a vendor to enforce the specific performance of a contract entered into in 1843 for the purchase of an estate called *Langley Priory*, in *Leicestershire*. The contract was entered into subject to conditions of sale, among which were the following:—

Where conditions of sale provide that interest shall be paid by the purchaser from a fixed time if the completion should be delayed by any cause whatever, delay merely occasioned by the state of the title, and not wilful on the part of the vendor, falls within the provision.

Third. The purchaser shall pay the auction duty immediately after the sale, and shall at the same time pay a deposit of 10*l*. per cent. upon the purchase-money into the hands of the agent of the vendor, and sign an agreement for payment of the remainder of the purchase-money on the 25th of *April* next, at the offices of Mr. *Barber*, in *Derby*, when the purchase shall be completed,

Where in addition to such a provision there were stipulations

(a) Vol. xvii. p. 267.

tions that the vendor might rescind on the title being objected to, and that if a good title should not be made to a defined proportion of the property, compensation should be allowed:—*Held*, that the non-delivery of a complete abstract, at a time fixed by the conditions, would not of itself exempt the purchaser from payment of interest.

Where the execution of an agreement fixing a time for completion, and requiring payment of interest in case of delay, was intercepted by negotiations, ending in an alteration of the agreement, but not of the time for completion:—*Held*, that in fixing the period for the payment of interest, this circumstance ought to be regarded.

A vendor who has to account to the purchaser for rents and profits from the time fixed for completion is not, unless a special case be made, liable to account for sums which he might have received but for his wilful default, nor entitled to an inquiry as to repairs or lasting improvements.

In fixing occupation rent to be paid by a vendor in such circumstances, it is not according to the course of the Court, to insert in the decree a provision respecting income tax, any just allowance, in that respect, being comprehended in the general and usual words,

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pleted, and the purchaser shall have the rents and profits, all outgoing to that time being cleared by the vendors.

Fifth. If, from any cause whatever, the purchase shall not be completed on the 25th of *April* next, the purchaser shall pay interest after the rate of 4*l.* per cent. per annum upon his purchase-money and on the value of the timber and trees on the land, bought by him, from that day until the completion of the purchase.

Seventh. The vendors will at their own expense deduce a good title to the premises sold according to these conditions, and deliver an abstract of title within two months to the purchaser or his solicitor, on application being made to them; and within six weeks from the delivery of the abstracts all objections to the title shall be stated in writing and delivered at the office of the vendor's solicitors, in default of which the title shall be considered as accepted; and in case the purchaser shall raise objections to the title, the vendors shall have the option of removing them or rescinding the contract, on repaying to the purchaser his deposit, but without interest or costs.

Eleventh. If any error or mismeasurement shall be discovered in the plan, particulars, or otherwise, the same shall not annul the sale, but a fair compensation or equivalent, according to the quantity of the land and the average of the whole purchase-money, shall be given or taken, as the case may require, and shall be settled by two referees or their umpire, one referee to be named in writing by each party within seven days after he shall be required to do so by the other party, and in case of default the other party may make the nomination; the referees shall appoint an umpire before they proceed to business,

business, and the decision of the umpire shall be final; and if there shall be any part or parts of the estate (not exceeding a twentieth part of the whole) to which a title cannot be made according to these conditions, such deficiency of title shall not annul the sale as to the remainder, but the purchaser shall be at liberty to refuse such part or parts if he think proper; and in that case the deduction to be made from the purchase-money shall be settled in like manner by two referees or an umpire.

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The deposit on the purchase-money was not paid as stipulated, and the vendors brought an action to recover damages for the breach of agreement. On the 30th of *January* 1844 a fresh agreement was entered into between the Plaintiffs and Defendant, that the agreement of the 30th of *November* 1843 should (subject to certain modifications) be performed; that the agreement then made should, so far as the time then elapsed would permit, be performed as if it had been made on the 30th of *November* 1843; and that such objections and requisitions only, as to the title and evidence of title, should be made as a willing purchaser would be advised to make for his necessary protection.

The title deeds and abstracts of title were partly in the hands of Mr. *Mousley*, the solicitor for the purchaser, as solicitor of certain mortgagees of portions of the estate, and partly in the possession of Mr. *Barber*, the vendor's solicitor.

On the 1st of *March* 1844, Mr. *Barber* sent abstracts of the title deeds in his possession to Mr. *Mousley*, who, on the 19th of *March*, objected that the abstracts were imperfect, and on the 26th of *June* 1844 sent thirty-nine requisitions on the title, to which answers were returned on the 17th of *September* following.

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On the 29th of *October* 1844, Mr. *Mousley* delivered further objections, and stated that no title had been shown to a part of the estate. The vendors thereupon required the purchaser to elect, under the agreement, to accept the title to this part, or reject it and accept compensation. The purchaser chose the former alternative.

On the 5th of *November* 1845, the draft conveyance was sent by the purchaser's solicitor, subject to the requisitions on the title. It was returned on the 26th of *February* 1846, and was finally approved on behalf of the purchaser on the 5th of *August* 1847. In *December* 1847 it was engrossed and executed by all parties whose execution was to be obtained by the vendor's solicitor.

In *July* 1852, the present suit was instituted by the vendors, who, by their bill, sought a specific performance of the contract, and prayed that the purchaser might be charged with interest from the 26th of *April* 1853, according to the conditions.

The Master of the Rolls, by the decree made upon the hearing of the cause, dated the 29th of *June* 1853, ordered and decreed that the agreement should be specifically performed. And it was ordered that the Defendant *John Shakspear* should, on or before the 4th of *August* then next, pay into the Bank, to the credit of the cause, 72,500*l.*, being the balance of the purchase-money. And it was ordered that the following accounts and inquiries should be taken and made; that is to say,

1. An account of interest upon the said sum of 72,500*l.*, after the rate of 4*l.* per cent. per annum, from the 31st of *July* 1847 down to the day of payment of the said sum of 72,500*l.* into the Bank, as aforesaid.

2. An inquiry when the Defendant first entered into
 the

the possession or the receipt of the rents and profits of the leasehold part of the said estate, or any and what part thereof.

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3. An account of the rents and profits of the freehold parts of the estate, and of the leasehold parts (other than those parts of which the Defendant had had the possession or been in receipt of the rents and profits), accrued from the 31st of *July* 1847, down to the day of the payment of the 72,500*l.* into the Bank; and also of such part of the leasehold of which the said Defendant should under inquiry (No. 2) have been found to have been in possession or in the receipt of the rents and profits, from the 31st of *July* 1847, down to the day when the said Defendant should be found to have been in such possession or receipt, come to the hands of the Plaintiffs, or either of them, or any person or persons by their or either of their order, or for their or either of their use, or which without their wilful default they might have received.

4. And it was ordered that an annual charge, by way of occupation rent, should be set on such parts (if any) of the said estates of which the Plaintiffs or either of them had been in the occupation. And it was ordered that what was due in respect thereof, after deducting income tax, should be ascertained and certified.

5. In taking the third and fourth mentioned accounts of rents and profits, it was ordered that the Plaintiffs should be allowed the sum of 166*l.* 4*s.* for lasting improvements.

6. An account of all sums of money laid out or expended by the Plaintiffs, or either of them, in necessary repairs on the said estate. And it was ordered, that what should have been so laid out or expended should be also allowed to the Plaintiffs in taking the third and fourth mentioned accounts of rents and profits. And it was ordered, that the amounts of rents and profits found due

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on the third and fourth mentioned accounts should be set off against the amount to be found due for interest on purchase-money on the fourth mentioned account, and the balance certified; and if the said balance should be found to be payable by the said defendant, it was ordered that the Defendant *John Shakspear* should within ten days next after the date of the proper certificate pay such balance into the Bank, subject to the further order of the Court. And the said last-mentioned amount, when so paid into the Bank, was not to be paid out or otherwise disposed of without notice to the Defendant. But if the balance of the said account should be certified to be payable to the Defendant, it was ordered, that the Plaintiffs *John Sherwin Sherwin* and *Edward Bouchier Hartopp* should within ten days thereafter pay the same to the said Defendant, or as he should direct.

And in taking the said accounts, all just allowances were to be made.

The Appellants, by their petition of appeal, prayed that the decree might be varied, by erasing from the decree the words, "or which without their wilful default they might have received," and by ordering an account to be taken not only of all sums laid out or expended by the Plaintiffs, or either of them, in necessary repairs, but also of all sums laid out or expended by the Plaintiffs, or either of them, in lasting improvements, with interest; and by ordering that what should have been so laid out or expended should be allowed to the Plaintiffs in taking the accounts.

Mr. *Lloyd* and Mr. *Bird*, for the Plaintiffs, opened the appeal.

Mr. *R. Palmer* and Mr. *Cairns*, for the Respondents, stated that the Respondents intended to present a cross-petition.

petition of appeal, and asked that the present appeal might stand over, in order that both might be heard together.

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Their LORDSHIPS desired to hear the counsel of the Appellants, if they disputed the competency of the Respondents to open the whole decree on the petition of appeal now before the Court (a).

Mr. Lloyd and Mr. Bird submitted, that where the appeal was only from a part of the decree, the Respondent must, if he complained of any other part, present a petition of appeal of his own.

The LORD JUSTICE KNIGHT BRUCE.

I have no doubt on the point, that upon an appeal from part of a decree the whole case is open to the Respondent. He may be satisfied with the decree as it stands, but that does not prevent him from contending, if its correctness is called in question in any particular, that it should be made more favourable to him in any other. It was only the other day that we made a decree less favourable to the Appellant than that from a part of which he appealed. If the Respondents are not prepared to argue the case, it may stand over, to give them time for preparation: but I think that no cross petition is requisite.

The LORD JUSTICE TURNER concurred.

Mr. Lloyd

(a) See *Rawlins v. Powell*, 1 *Watts v. Symes*, 2 *De G., Mac. & P. Wms.* 299; *Lord Brooke v. Gor.* 241.
Earl of Warwick, 13 *Jur.* 547;

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Mr. *Lloyd* and Mr. *Bird*, for the Plaintiffs.

First, with regard to the question of interest, the delay arose from the fault of the purchaser, and therefore there was no reason why he should not have been ordered to pay interest from the time fixed by the condition. *De Visme v. De Visme* (a) is not an authority to the contrary of this proposition.

Secondly, the decree ought not to have directed the vendor to account for rents and profits which he might have received without wilful default. No precedent of such a decree has been produced in the case of a vendor. A vendor is at the utmost a trustee for the purchaser, and a trustee is never ordered to account for what he might have received, but for wilful default, without a special case being made. Here no special case was attempted to be established, or indeed alleged: *Seton on Decrees* (b), *Murray v. Palmer* (c), *Howell v. Howell* (d), *Dakin v. Cope* (e), *Acland v. Gaisford* (f), *Wilson v. Clapham* (g).

Thirdly, as to costs. As a good title was shown before the bill was filed, the purchaser ought to have been ordered to pay the costs of the suit.

Mr. *R. Palmer* and Mr. *Cairns*, for the purchaser.

First, as to interest. When the Court has determined the time at which a title was shown, it has also determined the question of interest, since that is the time from which interest begins to run. We contend that, so far as has the Master of the Rolls been from giving too little interest

(a) 1 *Mac. & Gor.* 336.

(b) 2nd edit. p. 247.

(c) 2 *Sch. & Lef.* 474.(d) 2 *Myl. & Cr.* 478.(e) 2 *Russ.* 170.(f) 2 *Mad.* 29.(g) 1 *Jac. & W.* 36

interest, that he has given interest for too long a period. His Honor said, "I concur in the general statement of the rule of the Court by the Solicitor-General, and which is laid down in *De Visme v. De Visme* (a), namely, that the vendor shall not take advantage of his own wrong, and, by reason of it, obtain an advantage which he would not otherwise be entitled to. But the difficulty which the Court feels in cases of this description is, that it is impossible, in most cases, to ascertain whether the default is wilful or not. I do not concur in the observations, strongly urged on behalf of the Defendant, that it is essential that fraud in the vendor should be proved, or that the default made by him be wilful. Fraud is, I think, quite out of the question. But if the delay were the result of gross negligence, or if the difficulty in the title was such, that the vendor, if he had been so minded, might have remedied it, he shall not, by reason of his negligence, obtain a larger amount of interest from the purchaser than he would otherwise have been entitled to." This, we submit, is a true statement of the rule, as deduced from *De Visme v. De Visme* (a). [The Lord Justice Knight Bruce. Was not the condition in that case as to the failure of the purchaser in making payment? The word "fail" is not in the present condition. Is the principle of the decision in *De Visme v. De Visme* (a), that the Court will, in a proper case, alter in a sense the contract, by giving something in the nature of compensation or damages?] The principle, is, we submit, that the purchaser shall not suffer by the nonperformance of a condition which becomes impossible, owing to circumstances affecting not him, but the vendor. The conditions imposed on the vendor and purchaser are considered as mutually dependant on each other; and if the vendor

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(a) 1 Mac. & Gor. 336.

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vendor does not deduce his title by the stipulated time, he cannot require the purchaser to pay interest. [*The LORD JUSTICE KNIGHT BRUCE*. Would not that principle lead rather to the refusal of a decree for specific performance than to a modification of the contract? One condition here provides, that if from any cause whatever the purchase shall not be completed, interest shall be paid, and another condition contemplates the possibility of delay or failure in making out a title. On what grounds, then, does the purchaser claim to be relieved from his contract?] On that of the vendor not having performed his part: *Robertson v. Skelton* (a). Sir *E. Sugden* says, in his *Concise View* (b), "But where the delay is occasioned by the state of the title, and is not wilful, that seems to fall within the provision of 'any cause whatever.' But that condition cannot now be relied upon to that extent. However, if a purchaser agree that if the completion of the purchase should be delayed on his part beyond a given day, he will pay interest, and then make default, and when he is ready a trustee for the vendor refuse to join, the purchaser is liable to interest only from the day named until he was ready (c)." Now here the vendor did not deliver his abstract at the stipulated time. The circumstance that the solicitor for the purchaser had, in another character, some of the deeds, did not free the vendor from the condition, especially as he never notified that circumstance to the purchaser.

Next as to the form of the account. It is well settled that a vendor, remaining in possession after the time fixed for completion, stands in the position of a mortgagee for the unpaid purchase-money. The account, therefore

(a) 12 *Beav.* 363.

(b) *Page* 496.

(c) *Parry v. Smith*, 1 *Car.* 4 *Mar.* 554.

fore, is properly directed of the sums which might have been received but for his wilful default.

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Lastly, as to costs. This suit is occasioned entirely by the demand for interest, which cannot be sustained, and the Plaintiffs ought to pay the costs; and in this respect the decree should be altered.

They also referred to *Foster v. Deacon* (a), *Blennerhasset v. M'Namara* (b), *Holroyd v. Wyatt* (c).

The LORD JUSTICE KNIGHT BRUCE.

In this case, all the considerations properly belonging to one where there has been vexatious conduct, or gross delay, or unfair dealing, on the part of the vendor, appear to me to be without the dispute; for, whatever may be thought of the manner of proceeding that was adopted by the purchaser or his agent, or both of them, (and the agent being dead, I am unwilling to enter into a close examination of some portion of the conduct on that side of the litigation), there has been, in my opinion, no such case established against the vendors. Upon a large purchase of land in this country, considering the nature of the titles to land according to our institutions and the present course of practice, I think it in general not reasonably to be expected that at the time appointed for the delivery of the abstract an abstract shall be delivered at once, clear of all difficulty, of all doubt, or even of all objection. Such a case has perhaps never, or has certainly seldom occurred. My conception of the rule applicable to a case of that description I find expressed by Lord *St. Leonards*, in his smaller publication upon the *Law of Vendors and Purchasers*

(a) 3 *Madd.* 394. (b) 1 *Moll.* 81. (c) 1 *De G. & S.* 125.

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chasers (a), where he says, "But where the delay is occasioned by the state of the title, and is not wilful, that seems to fall within the provision of 'any cause whatever.'" The learned author afterwards proceeds to qualify the proposition, or to intimate a degree of hesitation upon it, arising out of some authorities to which he refers. I, however, speaking for myself, agree in the proposition as there stated, without any qualification. I refer only to the case of a contract, where the provision is that interest shall be paid in case of delay arising from any cause whatever, without restriction or qualification, as in the present case.

The fifth condition is [his Lordship read it]. Now we must remember that this stipulation is found in a contract which contemplates the possibility (and perhaps it would not be too much to say the probability) of a defective abstract being delivered, because the seventh condition says, "The vendors will at their own expense deduce a good title to the premises sold according to these conditions of sale, and deliver an abstract of title within two months to the purchaser or his solicitor, upon application being made by them." Upon the construction of this sentence, I apprehend that the phrase "within two months" applies simply to the delivery of the abstract and cannot, upon a proper interpretation of the terms be applied to the deduction of the title. The structure of the sentence, in my opinion, forbids it. It then goes on, "and within six weeks from the delivery of the abstract, all objections to the title shall be stated in writing, and delivered at the office of the vendor's solicitor, in default of which the title shall be considered as accepted. And in case the purchaser shall raise objection

jections to the title, the vendors shall have the option of removing the objections or rescinding the contract." It is plain, therefore, that the parties to the contract contemplated the possibility of a title imperfect at first, or an abstract originally incomplete. This part of the case does not end there; for the eleventh condition is [his Lordship read it]. Under this contract, I am of opinion that the mere circumstance that the abstract delivered was defective, or (which is stating a case of less difficulty) not supported by the evidence required to support it, would not be sufficient to exempt the purchaser from paying interest under the fifth condition of sale, the title and purchase being afterwards completed. Again, I say, to prevent the possibility of misapprehension, that I entirely exclude from every remark that I have made and from the present judgment a case of vexatious conduct, of dealing in bad faith, or of gross negligence on the part of the vendors, there being, in my opinion (whatever may be thought of the purchaser), no such case against the vendors here.

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These observations might *primâ facie* seem to lead to charging the purchaser with interest from the 25th of April, the day mentioned in the contract. There are, however, some peculiarities belonging to the present dispute. The contract originally signed was dated the 30th of November 1843, and I believe signed on that day. This original contract provided that, in addition to the purchase money, the timber should be valued. The parties, however, changed their views afterwards, and a contract was substituted for the contract signed as well as dated on the 30th November. The substituted contract bore the date of the 30th November, as the original contract had done, but was in fact not signed until the 10th of February. It varied the terms of the agreement by striking out the valuation of the

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timber, and increasing the purchase-money by a fix sum, the amount, I suppose, at which the timber was taken. Singularly enough, whether through oversight or otherwise, the date of the 25th of *April* remain the same, though bearing, it is obvious, a very different relation to the contract signed on the 10th of *February* from that which it bore, or would have borne, to the contract signed on the 30th of *November* previous. The peculiarities of the case, however, do not end here, for though an abstract was delivered or abstracts were delivered in *March*, they did not purport to relate to the whole estate. There was no abstract delivered extending to the whole property. No remark needs here be made upon the circumstance that the deeds relating to parts of the property were in the possession of the purchaser's solicitor, who was concerned for the mortgagees of the estate or parts of it, except this, that he agreed to supply that defect, and did so in a sense and in a manner. But it appears that to a portion of the estate, consisting more than seven and less than eight acres, that particular state of circumstances as to the deeds being in the possession of the purchaser's solicitor, did not apply. As to so much of the estate, the purchaser had a right to require the vendors to exhaust all their means in giving a title before resorting to the eleventh condition of sale; notwithstanding the comparative smallness of the quantity, the purchaser had a right to insist that an abstract should be delivered of that portion. Such an abstract was not delivered until some time in *November* 1844. As the particular day does not appear, so far as I am aware, I must take it, against the vendors, to have been on the last day of that month. Now down to that time, it appears to me, and I believe to my learned brother also, that the vendors' conduct (as I have already said) had been neither vexatious nor wanting in good faith, nor censurably dilatory. Having regard, however

to the different relation which the 25th of *April* bore to the contract signed on the 10th of *February*, from that which it bore to the contract signed on the 30th of *November*, it appears to me that the just mode of dealing with the case as to interest in the peculiar position in which the present affair stands, will be to charge the purchaser with interest from the 1st of *March* 1845. Accordingly, in my opinion, and I have reason to believe in that of my learned brother, the 1st of *March* 1845 ought to be substituted throughout this decree for the 31st of *July* 1847.

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The next question in point of importance is, the insertion of the expression "wilful default" in the decree. This point, I may say, was in effect not argued at the Rolls. The learned judge had not the benefit of a full discussion upon the subject. It seems to have been taken for granted at the bar, that a vendor remaining in possession during the discussions upon a title in which he, the vendor, has not been in default (and I repeat that the mere circumstance that in a considerable purchase the title is not complete at the day originally fixed is not a default on the part of the vendor within the meaning of the expression contained in the conditions with reference to this subject), was to be treated as a mortgagee in possession. I have never heard that rule laid down, nor do I believe that it is according to the practice of the Court. There is an analogy between such a case and that of a mortgagee in possession, but a very imperfect analogy. There may also be an analogy between his case and that of a trustee, but that is also an imperfect analogy. In the case of a trustee we know that a special case must be made before he can be so charged. In the case of a mortgagee it is a matter of course, and no special case is required. My impression, from the course of the Court

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(as far as I have been acquainted with it) and upon principle, is, that a special case ought to be made for the purpose of inserting those words in a decree for specific performance, where the vendor has been in possession during a time, in which he is to account for the rents. Now here there is no such special case. There appears to be no evidence that the vendors have not, in every respect, properly managed and duly dealt with the property.

There are two or three minor matters in the decree which require notice. One is, that in fixing the occupation rent to be paid for part of the property, a reference is made in so many words to an allowance of income tax. It appears to me that this is not according to the form of the Court. It may possibly be very right that the allowance should be made. Possibly those who have to pay the occupation rent will be allowed it; but, however that may be, I think that the particular expression has no place in the decree.

There is another respect in which the decree appears to me to differ from what is usual, and what I am accustomed to regard as the form of the Court, namely, that it directs in so many words an account of repairs and lasting improvements made by the vendors while remaining in possession. Now, upon a special case made for this purpose, this may be very right. I can conceive a case in which it would be absolutely indispensable to justice to do so. But no special case is here made for the purpose. It is very possible (as I have said, with regard to the income tax) that an allowance for repairs may be obtained under the head of just allowances or otherwise in taking the account. But however that may be, the words think have no place in the present decree.

Another point that seems to deserve attention is as to fixing the times during which the accounts of occupation rent and otherwise are to be taken. It seems to me that greater precision of expression with regard to time may be found useful in this respect. I think that now I have gone over all these portions of the decree upon which it is necessary to make any observation, except with regard to the costs; and as to those points upon which I have made remarks, I must say that the case is much more in the nature of an original hearing than an appeal. I cannot help thinking it probable in a high degree that if the learned judge before whom this case was heard had had the benefit of as full an argument as we have heard, his conclusion would have agreed with ours.

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With regard to costs, the Master of the Rolls ordered the Defendant to pay all the costs of the suit up to the hearing of the cause inclusive, and I think that there never was an order more consistent with justice, in every sense in which that word can be used. I restrain myself (as I have already stated that I should endeavour to do) from making remarks which otherwise might well have been made, seeing that the agent of the purchaser is dead. With respect to the costs of the present appeal, it has been peculiarly circumstanced in more than one respect; the decree has been varied partly in favour of one and partly in favour of the other of the parties, and the petition of appeal presented by the vendors raised one question specifically, which was abandoned at the bar. These considerations prevent me from giving way to the inclination that I feel to make the purchaser pay the costs of the appeal also. I fear that each party must bear his own costs of this appeal.

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The LORD JUSTICE TURNER.

The solicitor who was concerned for the purchaser this case being dead, I abstain from making any observations upon the course of conduct which has been pursued with reference to the completion of this purchase upon a contract entered into in the year 1843, and becoming the subject of litigation, after attempts at arrangement, in the year 1852. With reference to the questions in this case, which are mere matters of form I concur with my learned brother. I mean the question as to allowing the words, "after deducting income tax and the direction for an account of the moneys laid out in necessary repairs, to remain in the decree. No special case being made on either of these subjects, I think the words and this direction must be struck out. It is in my mind a matter of great importance that the decrees of this Court should not be loaded with unnecessary matters. They have been in use for years, and in some cases for centuries, and have proved effectual for the purpose for which they were intended; and in my opinion nothing more detrimental to the practice, or I may say to the law of this Court, can be introduced than the habit of adding to or altering decrees which of themselves are effectual to work out the purposes of justice.

The only other questions in the case are from what time interest is to run upon the purchase-money against the purchaser, and whether the vendors in the account to be taken against them are to be charged with wilful default.


As to the first of these questions, the argument on the part of the Defendant, the purchaser, is, that the contract proceeds on the hypothesis of the vendor performing his part of the contract, in completing the title to the property

erty. I concur in that observation to some extent. Undoubtedly it is incumbent on the vendor to deliver an abstract, showing a good title, but I dissent from the proposition that it is incumbent on the vendor, before he can claim interest under the contract, to show that the transaction is in such a position as to admit of immediate completion. I take it, that when the vendor has shown a perfect title upon his abstract, it must be presumed that the purchase-money will become payable by the purchaser.

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The circumstances of the present case distinguish it from all that I have seen. The abstract of the title to all the property except about seven acres (which are admitted not to be material to the enjoyment of the estate) was delivered on the 1st of *March* 1844. The opinion of the purchaser's counsel was given on the 7th of *August* 1844; and on the 9th of *August* 1844, the purchaser writes that he is desirous of being put into communication with *Christ's College*, from whom a lease, which formed part of the subject of sale, was held, and with whom it was necessary he should treat, for the purpose of renewing that lease. On the 29th of *August* 1844, he again writes to the solicitor of the vendors, stating his intention to complete the purchase, and asks for the liberty of sporting on the estate. As early, therefore, as the month of *August* 1844, this purchaser was satisfied that the contract into which he had entered was a contract which was capable of being and would be performed. There was, consequently, at this period an indication of his intention to complete the contract, which must necessarily mean an intention on his part to complete it according to its terms. There is, therefore, apart from all the decisions which have occurred on this subject, this special circumstance in the present case, that
 throughout



of the property which were not material to the
of the rest. The record admits that to be the
those seven acres a further abstract was delivered
9th of *November* 1844, and upon the further
opinion was given by the purchaser's solicitor
of *June* 1845. Now I have read with great care
of the statement contained in this bill, and wish
to me to be admitted on the answer, and I
anything to show that there was from that
objection to title remaining on the part of the
[After discussing some special circumstances with
the Defendant with reference to this point, his
continued:] There had, then, been a complete
by these abstracts as early as the month of *November*
From that time, it seems to me, that allowing for
the completion of the purchase from the delivery of
abstract similar to the period which was allowed in the
original agreement from the delivery of the
abstract to the completion of the purchase, this
must be charged with interest.

The other question is, whether the vendor
in possession of the estate, is to be charged with
default. The ordinary forms of the Court, so far
as I am aware of them, contain no such
There is a vast distinction between the practice

of exercising the utmost diligence for the benefit of himself and the mortgagor; but in the case of a vendor, the vendor does not take, but remains in possession of the estate. It may ultimately appear that the estate of which he is in possession may never become the estate of the purchaser at all, and I think that if he continues in the due and ordinary course of management, it is not the course of this Court to charge him, upon the principle of his having been converted into the position of a mortgagee, for the purchase-money. It seems to me, therefore, that the direction as to wilful default which is contained in the decree must be struck out. But then it is said that there is a special case in the present instance, which, although it may not justify the decree in charging the vendors with wilful default, would justify an inquiry on the subject, because it appears that the vendors, whilst in possession, reduced the rents of the property. It does not seem to me, upon the evidence before us, that there is any case for directing that inquiry. It seems that the same reduction of rents was made by the owners of other property in the neighbourhood. It is stated that the reduction of the rents was necessary, and there is nothing whatever to show that it was not made in the ordinary course of management by a prudent owner of the estate; and unless a vendor is chargeable as upon the principle of wilful default, I think that if he has done that which a prudent owner of the estate is bound to do, he ought not to be subjected to any inquiry on the subject.

My opinion, therefore, agrees with that of my learned brother, that the interest must run from the 1st of *March*, 1845, which is about three months from the period when the second abstract as to the seven acres must be taken to have been delivered, and that the inquiry

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inquiry as to wilful default must be struck out of decree, and also the directions as to the income tax as to the allowance for repairs.

The decree was ordered to be varied by substituting for the inquiry containing the words "wilful default," following:—

Let an account be taken of the rents and profits of freehold parts of the said estate, and of the leasehold parts of the said estate (other than those parts of leasehold of which the Defendant has had the possession or been in receipt of the rents and profits) accrued from the said 1st day of *March* 1845, down to the day of payment of the said sum of 72,500*l.* into the Bank, also of such part of the leaseholds of which the Defendant shall, under inquiry numbered 2 in the decree, be found to have been in the possession or in receipt of the rents and profits from the said 1st day of *March* 1845, down to the day when the Defendant shall be found to have been in such possession or receipt) or to the hands of the Plaintiffs or either of them, or person or persons by their or either of their order, or their or either of their use.

The decree was further varied by omitting the directions that an annual charge by way of occupation should be set on such parts (if any) of the estate which the Plaintiffs or either of them had been in occupation, and that what was due in respect thereof after deducting income tax, should be ascertained and certified; and by directing, in lieu thereof, an inquiry to be made whether the Plaintiffs or either of them

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since the 1st of *March* 1845 occupied any and what part or parts of the estate, and if so, that a value by way of annual rent should be set on the part or parts so occupied during such occupation thereof, that what was due in respect of such occupation should be certified.

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Another variation was made by omitting the direction that in taking the third and fourth accounts the Plaintiffs should be allowed 166*l.* 4*s.* for lasting improvements, and the direction that an account should be taken of all sums of money laid out or expended by the Plaintiffs or either of them in necessary repairs on the said estate, and that what should have been so laid out or expended should be allowed to the Plaintiffs.

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In the Matter of BOYLE, One, &c.

Ex parte TURNER.

July 7, 8.

Before The
LORDS JUSTICES.

Where a bill of costs has been delivered and security given for the amount, that is equivalent to payment, for the purpose of precluding taxation without special circumstances.

After the delivery of a solicitor's bill, and on the occasion of a purchase by the client, and of a mortgage to raise part of the purchase-money, which the client required in order to complete the purchase, the client executed a mortgage to the solicitor for a round sum,

which included and exceeded by a small amount the bill of costs and the amount of certain advances made formerly by the solicitor to the client. Some time afterwards the client applied for and received the excess, and subsequently the mortgage was transferred, with the client's concurrence:—*Held*, that this amounted to payment of the bill, so as to preclude taxation without further special circumstances than the above.

Where a solicitor pressed for the amount of his bill, but offered an opportunity of taxation, and apprised his client that it would be difficult to have the bill taxed afterwards, and the client chose to pay without taxation, and afterwards applied to have the bill taxed without showing overcharges amounting to fraud, *Held*, that the application ought to have been dismissed with costs.

THIS was an appeal from the decision of Vice-Chancellor *Stuart*, directing the taxation of three bills of costs, and the questions argued on the appeal, which applied to two of the bills only, were whether those bills had in effect been paid, and if so, whether there were special circumstances entitling the Respondent to have the bills nevertheless taxed. The facts appear sufficiently from the judgments. One of the grounds of the Vice-Chancellor's decision was that the circumstances of the case amounted to pressure, the client having contracted for the purchase of an estate without the means of completing the purchase, and being consequently obliged, as his Honor thought, to submit to the terms giving security for one of the disputed bills without taxation, or else to incur considerable additional delay and expense. His Honor referred to *Re Elmslie* (a).

Mr. *Malins* and Mr. *Selwyn* were for the Appellants.Mr. *Bacon* and Mr. *Speed* for the Respondent.

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(a) 12 *Beav.* 538.

The following cases were cited: *Barwell v. Brooks* (a),
In re Whitcombe (b), *Ex parte Wilkinson* (c), *In re*
Browne (d), *In re Dearden* (e).

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The LORD JUSTICE TURNER.

This is an appeal from an order of Vice-Chancellor *Stuart*, directing the delivery and taxation of a bill of costs for 191*l*, which has not been paid, and respecting which there is no question; and also directing the taxation of two other bills, which, whether paid or not, have undoubtedly been satisfied, and which form the subject of the appeal. These two bills amount, the one to about 450*l*., and the other to about 190*l*. I shall consider them separately. The language of the statute (f) is this: "That the payment of any such bill as aforesaid shall in no case preclude the Court or Judge, to whom application shall be made, from referring such bill for taxation, if the special circumstances of the case shall, in the opinion of such Court or Judge, appear to require the same." From this provision, that the payment of a bill shall not preclude taxation, if there are special circumstances rendering taxation proper, it is to be inferred that payment does preclude taxation, unless there are such special circumstances. In every case, therefore, in which a bill has been paid, it is necessary to inquire whether there have been such special circumstances as are sufficient to require taxation.

Now the circumstances of the present case are somewhat peculiar. It appears that Mr. *Turner* had, some time previously to August 1853, become the purchaser of an estate for 4,500*l*., and not having money sufficient to complete

(a) 8 *Beav.* 121.

(b) *Ib.* 140.

(c) 2 *Coll.* 92.

(d) 1 *De G. M. & G.* 322.

(e) 9 *Exch.* 210.

(f) 6 & 7 *Vict. c.* 73, s. 41.

taxation had depended on the propriety of doing this bonus, there might have been a material question on the subject. In the observations which I shall make, I do not mean to intimate any approval of this bonus, which with justice to the parties I am not in a position to give any opinion. That, however, is not the question to be considered; the question is as to the rightness of these bills taxed. On the 12th of *August* 1841, a transaction relating to the purchase and sale of the *London and North Western Railway* was completed, and the mortgage for 4,000*l.* was carried into effect; and on that occasion, after the completion of the purchase and the mortgage, *Boyle* delivered to *Turner* the bill of costs, amounting to 450*l.* 15*s.* 10*d.* On the same 12th of *August*, *Turner* was required to advance a mortgage to *Boyle* for 1,000*l.*, which sum was composed of 450*l.* 15*s.* 10*d.*, the amount of the bill of costs of the bonus of 250*l.*, and partly of a sum advanced to *Boyle* in the course of business, for the payment of a deposit on the purchase. These sums, however, together amount to 1,000*l.*, which was taken as a sum to be secured by the mortgage, and a balance of 82*l.* 11*s.* left in *Boyle's* hands, due to *Turner*, of 82*l.* 11*s.* On the 15th of *October* (the security for the 1,000*l.* having been given in *August*), the balance of 82*l.* 11*s.* was demanded by *Turner*, and paid to him by *Boyle*. The matter seems to have rested there till the 25th of

The other transactions to which I have just referred were these. It appears that *Turner*, who had made several other mortgages on different parts of his estates, was advised to pay off all the mortgages, including the 1,000*l.* due to *Boyle*, and *Boyle* acted for him in raising the requisite amount for that purpose, and in selling one of his estates. The transactions of raising this sum, which amounted to 4,600*l.*, and selling the farm, proceeded until the month of *February* 1854, at which time there had arisen disputes as to *Boyle's* bill for 450*l.* 15*s.* 10*d.* and the bonus. In *February* 1854 *Turner* discharged *Boyle*, and applied to a Mr. *Dover* to act as his solicitor; but it was arranged that *Boyle* should continue to act for *Turner* in raising the 4,600*l.*, and the sale of the farm. This business was completed on the 25th of *February* 1854, and in the meantime, on the 25th of *January*, *Boyle* had delivered his second bill of costs, which was for 190*l.* 12*s.* 9*d.*; but this was not paid till some time afterwards, namely, on the 8th of *March*, when it was paid out of the money that was raised by the mortgage and the sale of the farm. No further steps were taken until the 17th of *May* 1854, when *Turner* presented his petition for an order to tax both these bills.

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Now the question is, whether the facts which I have detailed were such special circumstances as to require the bills to be sent for taxation. I at present lay out of the case all question of overcharge. In the first place, the bill for 450*l.* 15*s.* 10*d.* seems to me to be beyond all question a paid bill. For what are the circumstances? There is a security for 1,000*l.*, in which is included 450*l.* 15*s.* 10*d.* for the amount of this bill, and that security is paid off on the 25th of *February* 1854, when the mortgage was transferred. But, supposing it had not been paid off, can it be said that, where there has been a delivery of a bill and a security given for the amount, it is necessary for the solicitor

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citor to place in the hands of the client a sum of money to be handed back to the solicitor, in order to constitute payment within the meaning of the act? I think not. In the present case, however, not only was there a settlement, but that settlement was ratified by the acceptance by *Turner* of the balance of 82*l.* 11*s.* 2*d.* And not only this, but on the 25th of *February* 1854, the mortgage was dealt with as a valid subsisting mortgage, and transferred by *Boyle*, with *Turner's* privity and concurrence, to a stranger. Surely, when a man has not only given security for the payment of a bill of costs, but has ratified the transaction, and has allowed the security to be dealt with as a subsisting one, it would be going much too far to say that such a bill can be afterwards referred for taxation, unless on the ground of pressure or undue influence, entitling the client to say that he was not a free agent.

What are the circumstances of the present case? In a letter from *Boyle* to *Turner*, of the 23rd of *February* 1854, he writes thus:

"On the face of such a letter as that of yesterday's date, I can make no reduction in my two bills of costs, nor can I make you a loan of the amount of the latter. You will arrange accordingly. If you desire to tax the latter, I am afraid you are now rather late, as it will have to be paid on the completion of the mortgage business, and if you desire it to be postponed for the purpose of taxing, I will at once do so. In that event, let me have a telegraphic message to-morrow morning." "I wish to impress on you the necessity of impugning my mortgage deed and of taxing my last bill of costs now, if you ever intend doing so. You will have no difficulty whatever in taxing now, but should you think proper to pay me, it will be very difficult for you to get the Court of Equity to reopen the transaction, as you act with your eyes wide open, and you have had abundance of time to investigate the items."

Mr.

Mr. Boyle might have added that the difficulty would be increased by the fact of the client having had the assistance of a different solicitor. Here, therefore, was a clear intimation to **Mr. Turner** that, if he paid the bill of costs, such payment would be set up against him, as being a payment not made under pressure, but after the offer of an opportunity for taxation. If a solicitor has made an offer to the client to have his bill taxed, and the client chooses to pay without taxation, it is too much to say that the account with the client is still to be kept open, and that at any time after payment the client may apply for taxation, without showing special circumstances.

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The same observations which apply to the bill for 450*l.* 15*s.* 10*d.* apply to the bill for 190*l.* 12*s.* 9*d.*, for the letter to which I have referred extends to the 190*l.* 12*s.* 9*d.*, and there is also an absence of such special circumstances as are necessary to render the jurisdiction of the Court applicable after payment. In short, I think that parties ought not to be allowed, in cases of taxation, any more than in other transactions, to play fast and loose with their solicitors, and I consider the present attempt one of that character.

The observations which I have made are subject to this qualification, that if there are overcharges of such a description as to be evidence of fraud, of course a payment affected by fraud cannot stand in equity, any more than any other fraudulent transaction, and therefore, if there are fraudulent overcharges, payment will not preclude taxation. But what are the overcharges complained of here? The first is a charge of 15*l.* for a negotiation which had not been carried out, and in respect of which it is alleged *Boyle* had agreed to make no charge. If that

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that had been the entire case, there might have been held to be a fraud sufficient to open the account. But how do the facts stand? Why, it appears that *Turner* said to *Boyle*, "I find that you have charged me with this sum of 15*l.* which you agreed not to charge," and that *Boyle* then said that the business had been an onerous one, and that the client ought to allow it, and it appears that the client then made the allowance. They made, in fact, a new agreement at that time. It is also complained that there are 240 letters charged for in one year, but is impossible, without knowing the circumstances of each case, to give an opinion on the fairness of this charge. The mere number is certainly not evidence that the circumstances did not justify it. I am of opinion that the alleged overcharges are not of that description which is necessary to open a bill which has been paid. For that purpose they must be extravagant, or amount to fraud. The case of the petitioner entirely fails on the special circumstances alleged, and I think that the petition for taxation ought to have been dismissed with costs.

The LORD JUSTICE KNIGHT BRUCE.

It appears to me that these bills were paid by the client with his eyes open to every material circumstance, were paid spontaneously, without pressure, and under the advice of another solicitor, and that, whether there are overcharges or not, there are none of a gross nature. I should therefore have dismissed the original petition for taxation, with costs, and that will now be the order made. There will be no costs of the appeal.

1855.

January 16,
17, 19, 20, 22,
31.

February 14.

Before The
Lord Chan-
cellor, LORD
CRANWORTH.

GOLDSMITH v. RUSSELL.

THE bill in this suit was filed on the 4th March 1852, by *George Goldsmith*, on behalf of himself and all other the creditors of *John Henry Cromwell Russell*, to impeach a settlement executed by him in favour of his wife *Eliza Russell*, and *Eliza Clementine Frances C. Russell* his daughter. The bill stated that the Plaintiff, in December 1845, lent *J. H. C. Russell* 200*l.* on his I.O.U., and that he was at that time indebted to various other parties; that in November 1845 the Plaintiff commenced an action against him, and that in December 1845 a verdict was found for the Plaintiff, on which occasion *J. H. C. Russell* applied to stay execution, which was consented to by the Plaintiff until the fourth day of Hilary Term then next, the costs of that action being taxed at 64*l.*; that on the 28th December the Plaintiff entered up judgment for the debt, damages and costs, and afterwards sued out a writ of *fi. fa.*, to which there

In December 1845 the Plaintiff obtained a judgment against his debtor, who in the same month, being otherwise largely indebted, conveyed his reversionary interest in certain real estate to trustees, upon trust for sale, and to hold the proceeds, in default of a joint appointment by himself and his wife, for the benefit of his wife and child; in May 1846 a settlement of the proceeds of the sale was made in favour of his wife and child. Previously to the execution of the settlement, the Plaintiff had sued out a writ of outlawry against the debtor who had absconded, and on his return in May 1852 the Plaintiff filed the present bill against him, the *cestuis que trust* and trustees of the settlement of May 1846, for the purpose of impeaching it as voluntary. After the institution of the suit the debtor was declared insolvent, and his assignee was made a party to the cause. The Defendants, the trustees and *cestuis que trust* of the settlement, alleged in their answers that the settlement of May 1846 was in pursuance of the previous deed of December 1845, and at the bar objected, that having regard to the outlawry, the Plaintiff ought to have clothed himself with the legal title by a grant from the Crown; that he ought also to have obtained a charging order under the 12th section of the Act 1 & 2 Vict. c. 110; and that the judgment debtor having become insolvent, the right of suit was in his assignee:—*Held*, declaring that the settlement of May 1846 was void against creditors, first, that the objection as to the want of a grant from the Crown was invalid, because the Plaintiff's claim was paramount to the settlement, which was good as against the insolvent, whose estate only vested in the Crown; secondly, that inasmuch as the funds which formed the subject of the settlement were in the names of trustees, not for the insolvent but for others, the proceeding by charging order would have been nugatory; and thirdly, that the insolvency having occurred after the institution of the suit, the frame of the suit was right.

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there was a return of *nulla bona*; that on the 17th December 1845, *J. H. C. Russell* filed a bill, praying the delivery up of the I.O.U., and on the 15th April 1846 on the application of the present Plaintiff, the bill was dismissed with costs. The bill stated that, pending such stay of execution, *J. H. C. Russell* sold all his household goods and furniture and left the country, and that at the time he left he had large sums of money in government funds, and that he was also entitled to a reversionary interest in a real estate in *Herts*, and that on the 9th February 1846 he purchased various sums of money in the long annuities and consols, and that on the 16th May 1846, he caused a settlement to be made in favour of his wife and child, for the purpose of protecting the same from the judgment debts. Shortly before the execution of this settlement, the Plaintiff sued out a writ of outlawry against *J. H. C. Russell*. The bill was subsequently amended, and stated that *J. H. C. Russell* returned to *England* in May 1852 and was arrested, and that he afterwards presented a petition to the Insolvent Court, whereupon he was declared insolvent, and all his estate and effects vested in the Defendant *Tapping* creditors' assignee.

The bill prayed an account of what was due to the Plaintiff for principal, interest and costs in respect of the judgment recovered upon the I.O.U., and for the payment of the costs incurred by the dismissal of *J. H. C. Russell's* bill, and that an account might be taken of the other debts, whether by simple contract or specialty due and owing from *J. H. C. Russell*, and that if necessary it might be declared that the funds, the subject of the settlement, might be liable to payment for the same and that a sufficient part thereof might be sold, and the proceeds applied to pay the Plaintiff and the other creditors, and that the deed poll dated the 16th May 184

and all other indentures or deeds, assigning or dealing with the funds, if any such had been executed, might be declared fraudulent and void as against the Plaintiff and the other creditors, and might be set aside and delivered up to be cancelled, or that it should appear that any such indenture or deed were valid and subsisting as against the Plaintiff, then that the Plaintiff and the other creditors might be decreed to be entitled to a sale of all the interest which *J. H. C. Russell* had or claimed to have, or might thereafter have or take in the aforesaid fund, or so much thereof as might be necessary to pay and satisfy the Plaintiff and all other the creditors their debts; and for an injunction and receiver.

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The Defendants, the trustees, and *Mrs. Russell* and her daughter, in their answers set up an indenture of the 13th *December* 1845, which was alleged to have been executed by *J. H. C. Russell* in pursuance of a previous parol agreement to make a settlement on his wife and child, and whereby in consideration of 500*l.* he conveyed his reversionary interest in the real estate to his father-in-law upon trust to sell and invest the proceeds on certain trusts for the benefit of his wife and daughter.

It appeared in evidence that this reversionary interest in the real estate was on the 23rd *January* 1846 sold to *J. H. C. Russell's* father for 4,350*l.*, and it was admitted by *J. H. C. Russell* that the 500*l.* was returned by him, on the same day as he received it, to his father-in-law, though he said it was for the purpose of being applied in payment of certain pressing claims, and it was further in evidence that the 500*l.* was returned by the father-in-law on the same day to the credit at a bank of the account of the person who advanced that sum to him.

When the cause came on to be heard before the Vice-Chancellor *Stuart*, on the 10th *June* 1854, an objection

was

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was taken on the part of the Defendants, that in consequence of the outlawry of the Defendant *J. H. C. Russell* the Attorney-General was a necessary party, and the cause stood over for the purpose of amending the bill by making him a party, and when the cause again came on before his Honor he directed that the bill should be dismissed with costs, on the ground that the deed impeached by the bill was only that of *May 1846*, whereas that of *December 1845* was part of the same transaction, and that the former only could not be impeached.

The Plaintiff now appealed to the Lord Chancellor.

Mr. *Malins*, Mr. *Torriano* and Mr. *Martindale* for the Plaintiff, the Appellant, were about to open the appeal, when

Mr. *Bacon* and Mr. *Bevir*, for the Defendants, *Miss Russell*, her daughter and the trustees of the settlement took three preliminary objections. First, that the Defendant, *J. H. C. Russell*, being an outlaw, the Plaintiff could not proceed without clothing himself with the legal title, by obtaining a grant from the Crown; *Balch v. Wastull* (a), ——— v. *Bromley* (b), *Cuddon v. Herbert* (c), *The Attorney-General v. Rickards* (d). Secondly, that this being a suit to affect stock, the Plaintiff ought to have taken out a charging order under the 12th section of the Act 1 & 2 Vict. c. 110. Thirdly, that the Plaintiff being a judgment creditor, ought to have issued a *fieri facias* and exhausted his legal remedy before having recourse to a Court of Equity.

The LORD CHANCELLOR, however, was of opinion that none of the objections was in the nature of a preliminary

(a) 1 P. W. 445.

(b) 2 P. W. 269.

(c) 7 Sim. 485.

(d) 8 Beav. 380.

liminary objection, and the argument was accordingly proceeded with.

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Mr. *Malins*, Mr. *Torriano* and Mr. *Martindale* then proceeded : —

The undisputed facts of the case show that the whole transaction was a scheme to take the proceeds of the real estate for the benefit of *J. H. C. Russell's* wife and daughter, to the prejudice of his creditors, and the assignment was clearly fraudulent and void under the statute 13 *Elizabeth*, c. 5; *Shears v. Rogers* (a), *Richardson v. Smallwood* (b), *Townsend v. Westacott* (c), *Norcutt v. Dodd* (d), *Columbine v. Penhall* (e). Upon the question of the outlawry they referred to *Paine v. Teap* (f), and *Mitford on Pleading*.

Mr. *Bacon* and Mr. *Bevir*, for the Defendants, Mrs. *Russell* and her infant daughter and the trustees of the deed of 1846, repeated their previous argument, as to the Plaintiff's having no title, in the absence of a grant from the Crown; they submitted that stock being a chose in action could not be attached in this Court, *Dundas v. Dutens* (g), *M'Carthy v. Goold* (h), *Grogan v. Cooke* (i); and that the Plaintiff could only proceed by the charging order; that even if those objections were not to prevail, still that, inasmuch as *J. H. C. Russell* was an insolvent, the only person who could sue in respect of his estate was the defendant *Tapping*, in whom, as the assignee, all the property of the defendant, *J. H. C. Russell*, was vested; and that a mere allegation of collusion between the assignee and the party against whom the relief

(a) 3 B. & Ad. 362.

(b) Jac. 552.

(c) 2 Beav. 340.

(d) Cr. & P. 100.

(e) 1 Sm. & Gif. 228.

(f) 1 Salk. 108.

(g) 2 Cox, 235.

(h) 1 B. & B. 387.

(i) 2 B. & B. 230.

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relief was prayed would not be sufficient to warrant such a suit, *Heath v. Chadwick* (a). With respect to the third objection, namely, on the obligation of the Plaintiff to complete his legal title before having recourse to a Court of Equity, they relied upon the authority of *Neate v. The Duke of Marlborough* (b), and *Smith v. Hurst* (c). They insisted generally, that the Plaintiff's judgment was no proof of a debt as against Mrs. Russell or her daughter; that the answer set up and established a *bonâ fide* case of a postnuptial settlement in pursuance of an antenuptial parol agreement, which was clearly valid, *Dundas v. Dutens* (d): in which case Lord Thurlow said, he could not conceive that a settlement made after marriage in pursuance of an agreement before marriage, though only parol, could ever be reckoned a fraudulent settlement. They relied on the case of *Harrison v. Richards* (e), as showing that the deed of 1846 could not alone be impeached without impeaching that of 1845, both being intimately connected, and, in fact, forming parts of one settlement. They also referred to *Ramsden v. Hylton* (f), *Wheeler v. Caryl* (g), *Campion v. Cotton* (h), *Brown v. Jones* (i), *Ward v. Shallet* (k), *Wood v. Dixie* (l), 2 *Sugden on Powers*, p. 250, ed. 6.

Mr. Wickens, for the Attorney-General, submitted, that if the Plaintiff succeeded he must be regarded as trustee for the Crown.

Mr. Terrell appeared for the Defendant Tapping, the assignee in insolvency, but took no part in the discussion.

MR.

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| (a) 2 <i>Phil.</i> 649. | (f) 2 <i>Ves. sen.</i> 304. |
| (b) 3 <i>Myl. & Cr.</i> 407; 9 <i>Sim.</i> | (g) <i>Amb.</i> 121. |
| 60. | (h) 17 <i>Ves.</i> 263a. |
| (c) 10 <i>Hare</i> , 30. | (i) 1 <i>Atk.</i> 188. |
| (d) 2 <i>Cox</i> , 235, see p. 240. | (k) 2 <i>Ves sen.</i> 16. |
| (e) 10 <i>Hare</i> , 81. | (l) 7 <i>Q. B.</i> 892. |

Mr. *Malins*, in reply, referred to *Bryson v. The Warwick and Birmingham Canal Company*(a), and *Rochfort v. Battersby* (b), to show that the Plaintiff's right to proceed against the voluntary assignee of *J. H. C. Russell* could not be prejudiced by his insolvency. With respect to the necessity for the Plaintiff's obtaining the charging order previously to filing this bill, he submitted that the stock was not standing in the name of *J. H. C. Russell* nor of any one in trust for him.

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The LORD CHANCELLOR, at the conclusion of the argument, said:—

I shall not finally dispose of the case without looking more carefully into the subject. With respect, however, to some of the objections which have been urged as preliminary, I may observe, with regard to the alleged necessity for obtaining the charging order, that in my opinion there is no ground for such an objection, inasmuch as no charging order could have been obtained; the stock not standing in the name of any one in trust for the debtor nor of the debtor whose act in making the settlement and transferring the funds into the names of the trustees is impeached by the bill. As to the objection that the right of suit was in the assignee, that would have prevailed, and the present suit could not have been maintained, if it had been filed after the property of the insolvent had vested in the assignee under his insolvency, because in that event the Insolvent Court would have been the proper tribunal, *Henth v. Chadwick* (c); but there was no insolvency at the time of the institution of the suit, and the Plaintiff is therefore not barred by the subsequent insolvency from prosecuting his claim in this Court. With respect to the objection as to the outlawry, though purely a technical objection, yet it is one which presses on my mind very much,

(a) 4 De G. Muc. & G. 711.

(c) 2 Phil. 649.

(b) 2 H. L. Cases, 388.

the case are against the Plaintiff, and he was that the transaction is not honestly stated by tiff, by merely referring to one single deed vouring to impeach that only, it being the last of three deeds. I must own that I cannot con view.

His Lordship here went minutely over the proceeded :—The Plaintiff, Mr. *Goldsmith*, being directed by judgment of *J. H. C. Russell*, the whether putting the technical objection as to t out of view, he could file a bill to impeach that of *May* 1846, without also impeaching the previous. I entertain no doubt that he could. What that there was a fraudulent settlement of the real interest of the settlor, and that though, in part that settlement, the sale might have been valid the investment of the proceeds of the sale upon of the settlement of *May* 1846 was fraudulent, before he seeks to impeach that settlement. The Vice-Chancellor did not, as it appears to me, the consideration of the validity of the sale of *December* 1846; if he did, I must disagree in thinking it not fraudulent. It was, I think, within the meaning of the statute of *Elizabeth*

on understanding only ; it was not obligatory, which circumstance of itself would be sufficient to bring the case within the statute of *Elizabeth* : but, besides this, there was much contrivance to show that the settlement was for value when it was not. I express no opinion with reference to the case of *Columbine v. Penhall* (a). The transaction as alleged in this case might have been *bonâ fide*, but it took place on the eve of the judgment being entered up, and the story of the 500*l.* having been paid to Mr. *Russell* and then by him returned to his father-in-law for the purpose of paying urgent claims, is very improbable ; while, if the transaction were otherwise valid, such payment would not have been necessary. His going abroad on account of ill-health just at the time when his creditors were most urgent, is a very suspicious occurrence. Upon all the circumstances of the case, I have come to the conclusion that the whole transaction was a fraudulent contrivance concocted in *December* 1845, and in my opinion the Plaintiff is entitled in this suit to have the same benefit as if he had impeached the original transaction under the deed of *December* 1845. The only difficulty which stands in the Plaintiff's way is the technical objection as to the outlawry. I shall consider that point and endeavour to find my way out of the difficulty.

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The LORD CHANCELLOR. Having now considered the only point on which I reserved my judgment, I am of opinion that the outlawry made no difference whatever as to the Plaintiff's right. The property of Mr. *Russell*, by reason of his outlawry, would have gone to the Crown absolutely, but here I think that nothing which is in question in this suit did pass to the Crown ; all that passed to the Crown was the property of Mr. *Russell* at the date of the outlawry. The settlement

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(a) 1 Sm. & Gif. 228.

will be taken in this Court instead of going to
venet Court.

The decree was accordingly drawn up, de-
ceit poll of the 16th *May* 1846 fraudulent a
against the creditors of *J. H. C. Russell*.
was directed as to what was due to the Plaintiff
other creditors of *J. H. C. Russell*, at the
vesting order, and the costs of the Plaintiff
Defendants, other than the Defendant *J. H.*
were directed to be taxed and paid out of the
funds, without prejudice to any application by th
under the insolvency as to his costs, charges an
properly incurred by him in the insolvency, and
costs in the cause, but the payment of the co
trustees and Mrs. *Russell* and her daughter was
to those of the Plaintiff, the insolvent's assign
Attorney-General.

February 14. On this day, Mr. *Malins* submitted that
special circumstances of the case the Plaintiff
be allowed his costs, as between solicitor and
of the fund which had been realized and mad
for the creditors by his diligence and at his
added, that if the Plaintiff were allowed only
tween party and party, the extra costs woul
considerable portion of the Plaintiff's debt

under similar circumstances, the costs of the Plaintiff were **directed** to be taxed as between solicitor and client, and **also** as between party and party, and the difference was **to be** ascertained,—the costs of the Plaintiff as between **party** and party to be paid out of the general fund. Out **of t**he remaining fund the Master was directed to set apart **a sum** equal to the amount of the debts, to be called the **creditors'** fund, and the difference between the Plaintiff's **costs** as between solicitor and client and party and party **were** deducted out of that fund, and the remainder of the **fund** was directed to be apportioned among the creditors, **including** the Plaintiff, in proportion to the amount of **their** respective debts.

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The LORD CHANCELLOR said he thought the application very reasonable, and directed the order to be drawn **up** in conformity with that pronounced in the case of *Stanton v. Hatfield* (a).

(a) 1 *Keen*, 358.



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Upon a treaty of marriage, the father of the intended wife said to the Plaintiff, the intended husband, "I pledge you my word, that after the death of my wife and myself, my daughter will have 10,000*l.* at the very least." Heads of articles, which were subsequently drawn up under the sanction of and approved by the father, and intended as instructions for a settle-

ment, contained the following passage:—"A covenant is to be drawn up by which Sir *W.* (the father) guarantees that his daughter shall at the decease of both parents have property of not less than 10,000*l.*" In the settlement which was afterwards executed before the marriage there was a recital to that effect, but there was no express covenant by the father to make good that sum. On a bill filed by the husband who had survived his wife, against the executor of the father—*Held*, that although the settlement, if it stood alone, could not have been rectified, yet that having regard to the articles and representation made by the father, there was sufficient evidence of mistake to authorize the Court to make the settlement conformable to the articles, and that the estate of the father was bound to make up the portion of his daughter to the stipulated sum.

Held, also, that the representation of the father, though not afterwards fulfilled, being of intention merely and not of fact, did not amount to such a misrepresentation as would entitle the husband to relief in equity on the ground of fraud.

BOLD v. HUTCHINSON.

THIS was an appeal by the Defendants *W. N. Hutchinson*, *F. J. T. Hutchinson* and *H. M. Gordon*, who were three of the children (*W. N. Hutchinson*, being also the executor) of the late Sir *W. Hutchinson*, from the decree of the Master of the Rolls. The bill in this suit was filed by the Rev. *Hugh Bold*, and stated that by the marriage settlement of the late Sir *W. Hutchinson* trusts were declared of certain funds for the benefit of Sir *W.* and Lady *Hutchinson* for their lives, and after the death of the survivor for the children of the marriage, in such shares and proportions as they or the survivor should appoint. The bill then stated that in the month of *December* 1839, treaty of marriage, which afterwards was duly solemnized was negotiated between the Plaintiff and Sir *W. Hutchinson*, on behalf of himself and his daughter *Theodosia Frances*, and that at an interview which took place on the 16th *December* 1839, between the Plaintiff and Sir *W. Hutchinson*, in the course of such treaty it was represented and stated to the Plaintiff by Sir *W. Hutchinson*, that his daughter *Theodosia Frances* would, at the death

the survivor of Sir *W.* and his wife, be entitled to a fortune of 10,000*l.* at least, and that Sir *W.* then said, "I pledge you my word, as an officer and a gentleman, that at my death and Lady *Hutchinson's*, my daughter will have 10,000*l.* at the very least. I have made no elder son, and my children will all share equally."

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The Plaintiff made a memorandum of this conversation immediately after the interview, and the bill stated that in accordance with that representation, and in pursuance of such agreement, and for the purpose of having the same carried into effect, Sir *W. Hutchinson* caused a paper writing, which was headed "Heads of Marriage Articles," to be drawn up as instructions for the preparation of a settlement to be executed on the marriage of the Plaintiff with *Theodosia Frances Hutchinson*, and which heads of marriage articles were assented to by the Plaintiff, and were as follows:—

"Heads of Marriage Articles between the Rev. *Hugh Bold* of — and *Theodosia Frances Hutchinson*.

"The trustees are *William Nelson Hutchinson*, Major, 20th regiment, and —. The Rev. *Hugh Bold* settles a jointure of 500*l.* per annum (to commence at his death) upon Miss *Hutchinson* during her natural life. During his lifetime the wife to have an allowance to provide clothes, &c. of 60*l.* per annum. The jointure to be secured on the estate and placed in the charge of the trustees.

"A covenant is to be drawn up by which Lieutenant-General Sir *W. Hutchinson* guarantees that his daughter *T. F. Hutchinson* shall have at the decease of both parents a property of not less than 10,000*l.* sterling (ten thousand)

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thousand) (of course this includes what she will have through Lady *Hutchinson*): this property to be settled on her and her children, to be equally divided among them after the decease of both parents and after the boys have attained the age of twenty-one, the girls the same or marriage."

"There being no children Miss *H.* is to have the power of making a will, leaving the property to which she may become entitled as aforesaid or otherwise as she may please. Should she die intestate and have no children then her property (after Mr. *Bold's* decease) to go to and be distributed among her own next of kin. If there are no children and Mr. *Bold* survives Miss *Hutchinson*, he is to have a life interest in all the property in any way possessed by Miss *Hutchinson*, and the effect or purport of Miss *Hutchinson's* deed or will is not to take place until the decease of Mr. *Bold*."

"In the event of there being no children, and after the death of both Mr. *Bold* and Miss *Hutchinson*, Mr. *Bold's* separate property to go as he directs in the same way as Miss *Hutchinson* has a power over her own property. The trustees to be duly appointed and empowered to act. The property that Miss *Hutchinson* will receive at the decease of the survivor of her parents to be settled and possessed by the trustees in the usual manner for the use and benefit of the married parties. The deed must contain the usual covenant to alter or vary the funds, property, &c. as the trustees may think proper upon the request of the married couple, so as to at any time improve the property, and Mr. *Bold* and wife are to have the power to authorize the trustees thus to act. Power of appointing other trustees in case of death, &c. &c. Mr. *Bold* covenants that as regards all property whatever that Miss *Hutchinson* may become entitled to
 at

at the death of her parents or otherwise to convey and settle the same agreeably to the trusts of the present deed of settlement."

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The above heads of articles were sent by Sir *W. Hutchinson* to Mr. *Allen*, his confidential solicitor, with whom the Plaintiff afterwards discussed in detail the provisions to be inserted in the settlement, the draft of which was accordingly prepared by Mr. *Allen*, as the solicitor for all parties. The settlement, which was in effect identical with the draft, was executed on the 25th *February* 1840. It contained a recital that *Theodosia Frances Bold* would, upon the death of the survivor of Sir *W. Hutchinson* and his wife, become entitled to a fortune, consisting of stock in the public funds, monies and other personal property to the amount or value of 10,000*l* and upwards, but it did not contain any express covenant on the part of Sir *W. Hutchinson* as was stipulated for by the marriage articles.

The marriage was solemnized on the 27th *February* 1840, and *Theodosia Frances Bold* died on the 29th *August* 1842. Sir *W. Hutchinson* died in *August* 1845, and by his will, after giving certain legacies, bequeathed his residuary property among his three children, who were the Defendants. Lady *Hutchinson* died in *June* 1852.

The bill prayed a declaration that the estate of the late Sir *W. Hutchinson* was liable to make up and pay such a principal sum of money as, together with the sum of 5,184*l*. 14*s*., (being one-fifth of the property comprised in the settlement of 1801, and the amount of the fortune of *Theodosia Frances Bold* deceased,) would amount to the sum of 10,000*l*., and that *W. N. Hutchinson*, as the executor of the said Sir *W. Hutchinson*, might pay that amount, or that he and his brother and sister might be

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decreed to repay all such sums as they had received on account of the estate of Sir *W. Hutchinson*. The bill also prayed that if necessary the settlement made upon the marriage of the Plaintiff with *Theodosia Frances Hutchinson* might be rectified, and that all such covenants and clauses might be inserted therein as might be necessary to make the settlement conformable to the agreement and arrangement evidenced by the articles.

It was in evidence that after the engrossment of the settlement a material alteration was inserted at the instance of the Plaintiff, whereby he was at liberty to postpone the jointure of 500*l.* a year to a charge of 16,000*l.*, which sum he was then about to borrow from the Equitable Assurance Company.

The Master of the Rolls having held that the Plaintiff was entitled to the relief prayed by the bill, the Defendants now appealed to the Lord Chancellor.

Mr. *Roundell Palmer* and Mr. *Selwyn*, for the Plaintiff in support of the decree of the Master of the Rolls, relied upon the authority of *De Biel v. Thomson* (a), and submitted that the recital in the settlement to the effect that *Theodosia Frances Hutchinson* would be entitled after the death of her parents to 10,000*l.* was conclusive to bind the estate of Sir *W. Hutchinson*, and contended that if that was not the effect of Sir *W. Hutchinson's* covenant it was nugatory altogether.

Mr. *Rolt* and Mr. *Toller*, for the Defendants, the Appellants.

We submit, first, that there is no foundation for the relief which has been granted, inasmuch as there has not been

(a) 3 *Beav.* 469; *S. C.* sub nom. *Hammersley v. De Biel*, 12 *Cl. & Fin.* 45.

been any representation within the equitable meaning of the term; nor, secondly, was there any contract; nor, thirdly, is there any equitable ground for the rectification of the settlement. We do not at all question the principle so clearly enunciated by Lord *Eldon* in the case of *Evans v. Bicknell* (a), where he says, "It is a very old head of equity that if a representation is made to another person going to deal in a matter of interest upon the faith of that representation, the former shall make that representation good, if he knows it to be false;" but before the Court would give any relief on this head, it requires either that there should be such a misrepresentation of a fact material in influencing the conduct of the person to whom it is made, or that there shall be a representation on the faith of which another has altered his position, and in such cases the Court acts merely on the principle of preventing fraud, *Money v. Jordan* (b): moreover the alleged representation in the bill, in order to be founded upon, must be with reference to the existing state of Sir *W. Hutchinson's* family at his death; a mere representation of something which a man intends to do is not legally binding. Here, then, there being no representation on which relief could be founded on the doctrine already referred to, there is no proof of any representation amounting to a contract, and the Plaintiff clearly is not entitled to any relief on that head. The only remaining ground upon which the decree can be sustained is, that the Plaintiff has established a case for reforming the settlement, but he has beyond all doubt failed to bring this case within any of the principles on which such relief has been granted. In the present case the instructions which are relied upon were departed from in the settlement in several particulars, and the instructions and settlement being

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(a) 6 Ves. 174. See p. 183. (b) 2 De G. Mac. & G. 318.

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being both antenuptial, the presumption is that the departure was advisedly made, and this Court will not under such circumstances reform the settlement; *Ludlow v. Anstey* (a); *Partyn v. Roberts* (b): the only exception to this rule being when the settlement itself professes to be in pursuance of the articles and is not, *The Marquess of Breadalbane v. The Marquess of Chandos* (c). If the settlement is not to be reformed by reference to the instructions, then there is no other representation or writing within the Statute of Frauds on which a rectification can be made, and the Defendant has pleaded the statute. It is said, however, that the covenant of Sir *W. Hutchinson* would be nugatory unless to fulfil the recital, but it is well settled that the operative part of the deed cannot be controlled by the recital.

Mr. R. Palmer, in reply.

The LORD-CHANCELLOR, at the conclusion of argument, said:—

I shall not quite finally dispose of this case without looking into the evidence. I have no doubt with respect to certain questions which have been raised during the argument. There does not appear to me any thing like misrepresentation, on the part of Sir *W. Hutchinson*, either of the facts, or of his future intentions with respect to the provision for his daughter. I may observe that I cannot assent to the position attributed to the Master of the Rolls, to the effect, that if the question depended only upon the deed, the Plaintiff would be entitled to relief. It is true that there is a recital in the deed to the effect that the intended wife would be entitled to a fortune of 10,000*l.*; and it is probable that Sir *W. Hutchinson*

(a) 4 *Ves.* 501.

(b) *Amb.* 315.

(c) 2 *Myl. & Cr.* 711.

chinson may have told the Plaintiff that his daughter would be so entitled, but I think there is nothing on the face of the deed alone which amounted to a representation or promise by Sir *W. Hutchinson*. The question, as it appears to me, resolves itself into this, whether the deed agrees with the articles; and, assuming that the deed has not purposely departed from the articles, what is the proper construction of the deed and the articles taken together? It was said that what took place previously to the marriage was equivalent to a contract, that the fortune of the lady amounted to 10,000*l*. What passed by word of mouth, namely, the expression, "I pledge you my word, as an officer and a gentleman, that, at my death and Lady *Hutchinson's*, my daughter will have 10,000*l*. at the very least," might, by possibility, have admitted of the interpretation that she would be entitled to 10,000*l*. But it is a far-fetched construction to say that it was a representation that her fortune actually and at the time consisted of that sum. I think it only shows that when the conversation took place, both parties understood that the daughter was to have 10,000*l*. at the death of the survivor of her parents, because Sir *W. Hutchinson* adds, "I do not mean to make an elder son." I am of opinion, however, that nothing which was said amounted to a misrepresentation within the meaning of the term in this Court, even although afterwards he did not make good that sum. The misrepresentation, to come within the doctrine, must be a misrepresentation at the time it was made. If it is made with the view of inducing a person to act, and such person has acted upon the faith of the representation, then the person making the representation would in Equity be bound to fulfil it. If, however, a person merely says "I will leave my daughter 10,000*l*." it will not amount to misrepresentation, if he does not leave her that sum, though it might amount to a contract to do so. Here it

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is

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is clear that there was at one time a representation by Sir *W. Hutchinson*, that he should guarantee a certain sum. That was afterwards introduced into a certain instrument, and the Statute of Frauds does not apply, for that written paper was shown to Sir *W. Hutchinson*, and he adopted it, and that I think amounts to sufficient recognition of it, as an agreement that he should make up his daughter's fortune to 10,000*l.* It is said that the Plaintiff was the only person who communicated with the solicitor; under all the circumstances of the case, that was very natural.

The settlement was prepared not in conformity with the articles, and the point on which I entertain some doubt is how far it is the practice of this Court to reform settlements which have, as in the present case, been made before marriage. Unless my recollection fails, the doctrine of this Court, as to be collected from the old cases, was, that when the articles and settlement were both made before marriage, this Court would not interfere, unless the settlement was expressed to be made in pursuance of the articles, for without such a recital, the Court supposed the parties had altered their intention, as regards the nature and terms of the contract. I rather think that is not the doctrine now; but there is nothing on the face of this settlement which professes to be in pursuance of the previous articles; and the questions which I shall have for consideration are, first, whether the later authorities do not dispense with the necessity of a reference to the previous articles in the settlement; and, secondly, upon the evidence, I am satisfied that such a case has been established, as to make it a right of discretion to rectify this settlement. The case of *De Biel v. Thomson* (a) was that of a postnuptial

(a) 3 *Beav.* 469; *S. C.* sub nom. *Hammersley v. De Biel*, 12 *Cl. & Fin.* 45.

tlement, and did not deal with the question which has arisen here. I may also observe, that the settlement in this case has been impressed with a stamp equivalent to 10,000*l*.

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*The* LORD CHANCELLOR.

I have now looked into the authorities, and the distinction to which I referred will be found in the case of *Legg v. Goldwire* at the end of the case of *Glenorchy v. Bosville* (a), where Lord *Talbot* says, "Where articles are entered into before marriage and settlement made after marriage different from those articles (as if by articles the estate was to be in strict settlement, and by the settlement the husband is made tenant in tail, whereby he hath it in his power to bar the issue), this Court will set up the articles against the settlement. But where both articles and settlement are previous to the marriage, at a time when all parties are at liberty, the settlement differing from the articles will be taken as a new agreement between them and shall controul the articles. And although in the case of *West and Erisey, Michaelmas, 1726*, in the Court of Exchequer, and afterwards in the House of Lords in 1727, the articles were made to controul the settlement made before marriage, yet that resolution no way contradicts the general rule; for in that case the settlement was expressly mentioned to be made in pursuance and performance of the said marriage articles, whereby the intent appeared to be still the same as it was at the making of the articles." That was what I had in my mind, but I also stated my impression that the later authorities

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(a) *Ca. Temp. Talbot*, p. 20.

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authorities had departed from the principles to be fo in the older cases. The doctrine now is, that wh settlement purports to be in pursuance of articles ent into before marriage and there is any variance, ther evidence is necessary in order to have the settler corrected; and although the settlement contains no ference to the articles, yet if it can be shown that settlement was intended to be in conformity with articles, yet if there is clear and satisfactory evid showing that the discrepancy had arisen from a mist the Court will reform the settlement and make it confi able to the real intention of the parties. This was in the case of *Rogers v. Earl (a)*, where parol evid was admitted to prove a mistake of a solicitor in ta instructions for a settlement; all the facts how do not appear in that report, but they are fully det by Lord *St. Leonards*, in the first volume of his *Ven and Purchasers*, page 264. A similar equity was a nistered in the case of *Young v. Young*, the facts of w are stated by Sir *Thomas Clarke*, in his judgment in case of *Rogers v. Earl (a)*, and are these, "The Plai married *Lucy*, a Defendant and an infant; the husl stated or drew by way of instructions to his atto what the wife's fortune then was, and agreed to ad much, to be settled in strict settlement, and like stated that the intended wife had a prospect of additional fortune to which he agreed, provided it did exceed 1,000*l.*, to add a like sum to be likewise set strictly, and he to have the excess. The settlement prepared according to the instructions, but the solici having in the margin of the draft added double the s the settlement was prepared and executed accordin that mistake. Parol evidence was admitted to prove mistake, that is, the settlement was first shown to di

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(a) 1 *Dick.* 294.

from the written instructions, and parol evidence of the counsel and attorney was then received to prove the mistake."

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In these and other cases referred to by Lord *St. Leonards*, the settlements were rectified and the later authorities have put the matter upon the true footing, *i.e.*, that if it is perfectly palpable that there has been a mistake on which the settlement has been made, the Court will admit evidence to correct it. The question before me is, whether I am satisfied that the settlement here has been made in error. I think in this case it is put beyond all doubt. The agreement was written out by the son, in the shape of articles which were shown to Sir *W. Hutchinson*, his father, and approved by him. It was argued, that they were only Mr. *Bold's* instructions, but there was no attempt on the part of Sir *W. Hutchinson* to alter them after they were submitted to him.

On the whole, I am clearly of opinion that the settlement was framed in error. I do not, however, think that this is a legitimate deduction from the settlement itself; and if the Master of the Rolls was of that opinion, I disagree with him, but I am not satisfied that such was his opinion. At all events, I may say I entirely concur with him in thinking that the Plaintiff is entitled to the relief which he seeks, and therefore this appeal must be dismissed with costs.



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Nov. 7, 8.

Before The  
Lord Chan-  
cellor LORD  
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## HUNT v. DORSETT.

**T**HIS was an appeal against part of an order made the 8th May 1855, on a motion for a decree by the Vice-Chancellor *Stuart* upon the construction of the will of *James Smith*. By that will the testator gave his real and personal estate to trustees upon trust that they, at the expiration of twenty-one years after the decease of the survivor of his ten nephews and nieces should sell his real estate and stand possessed of the proceeds, and of his personal estate upon trust, *inter alia*, pay the rents, interest and annual produce to his ten nephews and nieces, nominatim, who should be living at the time of his decease, in equal shares and proportions, such several shares to be paid during their lives and the testator declared, that as to the shares of rents, interests and annual produce to be taken by the said nephews, the same to be paid to them respectively during their respective lives, or until they or any of them should at any time or times after his the said testator's decease become and be declared bankrupts or bankrupts.

A testator gave his real and personal estate to trustees on trust, to sell and convert the same and pay the interest and annual produce to his ten nephews and nieces nominatim for their respective lives, and after their respective deceases the share of such nephew or niece so dying "to be held in trust for all and every the children or child of my said nephews and nieces, who being a son or sons should attain the age of twenty-one years, or being a daughter or daughters should attain that age or marry, to be divided between and amongst such last children, if more than one, in equal shares and proportions; and if any one or more of them my said nephews and nieces shall not have any child, who being a son shall attain twenty-one, or being a daughter shall attain that age or marry under it, then and in each of any such case as well the original share or shares of, as also the share or shares now living or accruing to each or any such last-mentioned nephew or niece and his or her child or children, or to such child or children only in possession or expectancy, shall go and accrue to and vest in the survivors or survivor or others or other of the my said nephews and nieces and their respective children, at and in such and the same times, shares and proportions and manner as are hereinbefore expressed of and concerning their respective original shares." &c. One of the nephews having died leaving an only child, an infant,—*Held*, that such only child exclusively became presumptively entitled to his father's share, subject to its going over as provided by the will in the event of his dying under twenty-one without children.

or any execution should issue against them or any of them, their or any of their lands or tenements, goods or chattels, or any part thereof, or they or any of them should take the benefit of any Act of Parliament made or to be made for the discharge or relief of insolvent debtors, or enter into any general composition with his or their respective creditors, or any body or class of them, for payment of a part only of their or his respective debts in satisfaction of the whole, or make any assignment or disposition of his or their estate and effects, or the greater part thereof, for the benefit of his or their respective creditors, or in any manner become insolvent; and on the happening of any such bankruptcy or insolvency, or on any such composition with creditors being made as aforesaid, then and immediately thereafter, and likewise from and after the respective deceases of each of them his nephews and nieces, the several children of his said sister *Sarah Dorsett*, the testator's will was, that the part or share which the nephew or niece so becoming bankrupt or insolvent, compounding with creditors or dying respectively as aforesaid, should have been entitled in his or her lifetime, of or in the rents, interest and other annual produce of his the said testator's said real and personal estate until sold and converted, and the monies to arise therefrom or the residue thereof as the case might be, and also a like part or share of or in the capital or principal monies to arise from the sale or conversion of his said real and personal estate when effected, and the stocks, funds or securities in or upon which such monies might be invested, should go and be held in trust for all and every the children or child of his said nephews and nieces, who being a son or sons should attain the age of twenty-one years, or being a daughter or daughters should attain that age or marry under it, to be divided between and amongst such last children, if more than one, in equal shares

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shares and proportions, and their respective executors, administrators or assigns; and if there should be but one such child, then the whole of each such share as aforesaid to be in trust for such one child, his or her executors, administrators or assigns. And the will also contained a proviso, that if any one or more of them his said nephews and nieces, the several children of his said sister, *Sarah Dorsett*, should not have any child, who being a son should attain the age of twenty-one year or being a daughter should attain that age or marry under it, then and in each or any such case as well the original share or shares of, as also the share or shares surviving or accruing to each or any such last-mentioned nephew or niece and his or her child or children, or such child or children only in possession or expectancy respectively as aforesaid, of or in the monies to arise from the sale and conversion of his the said testator's said real and personal estates, and the rents, interest and other annual produce thereof, should go and accrue to and vest in the survivors or survivor or others or other of them the said nephews and nieces and their respective children (any), or to or in such children only as the event might be, at and in such and the same times, shares, proportions and manner as were thereinbefore expressed of and concerning their respective original shares or interests or in the monies to arise from the sale and conversion of his said real and personal estates, and the rents, interest and other annual produce thereof, under the several trusts thereinbefore declared thereof, or as near thereto as circumstances would permit.

The testator died on the 24th February 1829, leaving his ten nephews and nieces surviving him; three of them died soon after without issue, four had married and had children, and three remained unmarried. *John Smith Dorsett*, one of the nephews, died on the 11th August 1841

**1840**, leaving *J. Aldridge Dorsett*, his only child, him surviving. Another of the testator's sons, *William Smith Dorsett*, became bankrupt and had a family.

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The bill was filed by the trustees for the declaration of **the** Court as to the rights of the parties, first, as to the **share**, the income of which was paid to *John Smith Dorsett* during his life, whether on his decease his only child, *J. Aldridge Dorsett*, alone became presumptively entitled thereto, so that the same would vest in him alone on attaining his age of twenty-one years, or whether all the children of the other nephews and nieces of the testator became presumptively or otherwise entitled thereto along with *J. Aldridge Dorsett*; and, secondly, as to the share, **the** income of which was payable to *William Smith Dorsett* before the determination of his life estate therein, whether on the determination of his life estate therein his six children alone became presumptively entitled thereto, so that the same would vest in them alone on attaining their ages of twenty-one years, or whether all **the** children of the other nephews and nieces became presumptively or otherwise entitled thereto along with his six children.

The Vice-Chancellor declared that the share of *John Smith Dorsett* was to be held upon his death in trust for his son *J. Aldridge Dorsett*, and all or every the children born or to be born of the testator's other nephews and nieces *per capita* and not *per stirpes*. The Vice-Chancellor made a similar declaration with respect to the share of *William Smith Dorsett*, the son, who had become bankrupt. From that decree *J. Aldridge Dorsett*, the son of *J. S. Dorsett*, the deceased nephew, now appealed to the Lord Chancellor.

Mr. Wigram and Mr. Nalder, in support of the appeal.

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The Vice-Chancellor felt himself bound to adopt the literal construction, and to hold that all the children of all the nephews and nieces took *per capita*. We submit, however, that the general intention will best be carried out by holding that the children of a deceased nephew or niece were to take *per stirpes*. Slight expressions in a will are sufficient to induce the Court to adopt the interpretation for which we contend, and in this will the words, "respective children," in the clause as to survivorship and accruer, quite justify that construction; *Brett v. Horton* (a), *Hawkins v. Hamerton* (b), *Key v. Key* (c).

Mr. *Elmsley* and Mr. *Southgate*, for some of the nephews who supported the Appellant's view.

Mr. *Bacon*, Mr. *Rolt*, Mr. *Amphlett* and Mr. *Whitworth*, *contra*, in support of the Vice-Chancellor's decree.

We submit that the construction of the Vice-Chancellor gives effect to the literal import of the language used by the testator, and it is a firmly-established canon of construction that words in a will are not to be altered by a conjectural interpretation; in the present case there is nothing inconsistent in the whole frame of this will with the probable intention, and it might well be that the testator intended to make all his nephews and nieces take equally, while their families should take unequally.

Mr. *Malins* and Mr. *Simpson* for the trustees.

Mr. *Wigram*, in reply.

*The LORD CHANCELLOR.*

I cannot concur with the Vice-Chancellor in the  
 construction

(a) 4 *Beav.* 239.

(c) 4 *De G. Mac. & G.* 73.

(b) 16 *Sim.* 410.

struction which he has put upon this will. It is doubtfully a difficult task to construe wills so ambiguously framed. I quite agree with the Vice-Chancellor in the general principles of construction which he has enunciated, as to giving effect to the literal import of the words. I have invariably adhered to the rule, that where there is no ambiguity in the words themselves, no other construction, than that which the words import, ought to be given; but where the language is so confused as to admit of more than one interpretation, I think it is not an improper canon of construction which runs against an irrational mode of enjoying the property bequeathed. Here nothing, as it appears to me, could have been less in the testator's mind than that which would be the result of the construction which the Vice-Chancellor has adopted. It is true the words used are ambiguous and admit both of the construction which, in all probability, would give effect to the intention of the testator, and also of that construction which would, in my opinion, defeat it. The question is, what was meant by the phrase "and from and after the respective deceases of each of them my said nephews and nieces the part or share &c. shall go and be held in trust for all and every one of the children or child of my said nephews and nieces, &c." Does it mean the children of all his nephews and nieces, or only of those last spoken of? If it referred only to the latter it would be confined to the children of those dying; and that seems to me the most probable construction, while the clause will then bear its natural meaning; and I do not confine myself to the consideration of that clause alone. My view is supported by what follows, and which shows that it is the proper construction. The testator proceeds to say—"if any one or more of my said nephews and nieces shall not have any child, who being

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a son shall attain the age of twenty-one years, or being a daughter shall attain that age or marry under it, then and in each or any such case, as well the original share or shares of as also the share or shares surviving or accruing to each or any such last-mentioned nephew or niece and his or her child or children only in possession or expectancy, &c. shall go and accrue to and vest in the survivors and survivor or others or other of them my said nephews and nieces and their respective children:" this is to say, if any child now under twenty-one should die before attaining that age, it is to go to the nephews and nieces and not the other children. In my opinion, therefore, the decree of the Vice-Chancellor is inaccurate in not providing for the contingency of the share of a child dying under twenty-one going over in the way I have pointed out; and unless the language used by the testator were such that it could not admit of any other construction than that adopted by the Vice-Chancellor, I should not adopt it. In this case, however, the testator has clearly intimated, that the children of his nephews and nieces were to take *per stirpes*; for he provides that the share of such child dying under twenty-one shall go to the nephews and nieces and their children or the children only, as the case might be, "at and in such manner as are hereinbefore expressed of and concerning their respective original shares, &c.," thus manifesting that what he had said before, also carried the shares of nephews or nieces dying, to their respective children. I think, therefore, that on the death of John Smith Dorsett his share must be taken to have passed to his son, subject to its going over, as the will directs, in the event of his dying under twenty-one without children. The decree must therefore be varied.

children and issue And as to one other fourth part thereof upon such trusts as are hereinafter declared touching the sum of 20,000*l.* Three per Cent. Reduced Consolidated Bank Annuities hereinafter bequeathed in trust for my daughter *Anne Murray Frances Mary Hindle* her husband children and issue And as to the remaining fourth part thereof upon such trusts as are hereinafter declared touching the sum of 20,000*l.* Three per Centum Reduced Consolidated Bank Annuities hereinafter bequeathed in trust for my daughter *Maria Hindle* her husband children and issue."

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The testator next proceeded to confer certain powers with reference to his devised estates, and then directed as follows :—"And I direct the said *George Jacson* and *James Pedder* and the survivor of them and the executors administrators and assigns of such survivor to stand possessed of the sum of 20,000*l.* Three-and-a-half per Centum Consolidated Bank Annuities upon trust that they my said trustees and the survivor of them and the executors administrators and assigns of such survivor do and shall pay the dividends interest and annual produce of the said sum of 20,000*l.* Three-and-a-half per Centum Consolidated Bank Annuities to my son *W. F. Hindle* and his assigns during his life and after his decease in trust during the widowhood of *Elizabeth* his wife to pay her out of the interest dividends and annual produce of the said sum of 20,000*l.* Three-and-a-half per Cent. Consolidated Bank Annuities the clear yearly sum of 200*l.* but if she shall marry again then after her second marriage to pay to her separate use free from the debts and engagements of any her future husband the clear sum of 100*l.* only during the then remainder of her natural life the first of such payments to be made at the end of one calendar month after the death of my said son *W. F. Hindle.*"

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use of *G. Jacson* and *J. Pedder* and their heirs during the life of *J. F. Hindle* the younger in trust to preserve contingent remainders, with remainder to the use of *John Chisenhall Johnson* and *Hambleton Custance* their executors administrators and assigns for the term of five hundred years upon the trusts thereafter declared, with remainder to the use of the first son of the body of *J. F. Hindle* the younger in tail, with remainder to the use of the second and other sons of *J. F. Hindle* the younger severally and successively in tail, with remainder to the use of the daughter and daughters of *J. F. Hindle* the younger equally between them if more than one in tail, with cross remainders between them in tail, with similar limitations in use to the testator's second son *W. F. Hindle* and his sons and daughters in succession, with divers remainders over, and an ultimate remainder to the testator's own right heirs for ever.

The will then contained the following declaration:—  
“And as to for and concerning the said term of 500 years hereinbefore limited unto the said *John Chisenhall Johnson* and *Hambleton Custance* their executors administrators and assigns as aforesaid I do hereby declare that the same is to them limited as aforesaid Upon the trusts and to and for the uses intents and purposes and subject to the powers declarations and agreements hereinafter declared and expressed of and concerning the same that is to say in case there shall happen to be an eldest or only son of the body of my said son *John Fowden Hindle* and there shall happen to be one or more younger child or children whether the same be a daughter or daughters or a younger son or sons born in the lifetime or in due time after the decease of the said *J. F. Hindle* then upon trust that they the said *J. C. Johnson* and *H. Custance* or the survivor of them or the executors administrators or assigns of such survivor shall and do either in the lifetime

time of the said *J. F. Hindle* (if he shall so think fit and direct the same) or else after his decease by demise mortgage or sale of all or any part of the real estate to them limited for the said term of 500 years as aforesaid or any part or parts thereof for all or any part of the same term or by or out of the rents issues and profits thereof or of any part thereof or by all or any of the ways and means aforesaid or by such other ways or means as they or he shall think fit raise and levy or borrow and take up at interest the full sum of 20,000*l.* for the portion and portions of such daughter or daughters younger son or sons of the said *John F. Hindle* to be payable" &c.

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And then after directions as to payment, and clauses for maintenance and advancement, the will proceeded as follows:—" And upon further trust in case the limitation hereinbefore contained of my said real estates to my said son *W. F. Hindle* or any son or sons of his body or the heirs male of the body of any such son or sons shall take effect and there shall happen to be an eldest or only son of the body of my said son *W. F. Hindle* and there also happen to be a daughter or daughters or a younger son or sons born in the lifetime or in due time after the decease of my said son *W. F. Hindle* then that they the said *J. C. Johnson* and *H. Custance* or the survivor of them or the executors administrators or assigns of such survivor shall and do by the ways and means aforesaid or any of them levy and raise the sum of 20,000*l.* for the portion or portions of such daughter or daughters younger son or sons to be payable to such child or children respectively in such shares and at such times and with such limitations for maintenance as my said son *W. F. Hindle* shall by any his deed or will to be executed in manner aforesaid appoint and for want of such direction to be paid in such manner and at such times and with such provision for maintenance and education

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and advancement and such benefit of survivorship accrue and other directions and provisions in every respect as the said younger children and issue of my said son *W. F. Hindle* as hereinbefore contained as to the portions provided for the younger children of my said son *J. F. Hindle* and as if all those directions had been here repeated and the name of my said son *W. F. Hindle* substituted for that of my son *J. F. Hindle* throughout the same And upon further trust in case there shall happen to be a failure of sons of the body of my said son *J. F. Hindle* and of their issue and the limitations hereinbefore contained to his daughters or the heirs of their bodies or any of the subsequent limitations hereinbefore contained shall take effect then that they the said *J. C. Johnson* and *H. Custance* or the survivor of them or the executors administrators or assigns of such survivor shall and do by demise mortgage or sale of all or any part of the real estate to them limited for the said term of 50 years as aforesaid or any part or parts thereof for all or any part of the same term or by or out of the rent issues and profits thereof or of any part thereof or by all or any of the ways and means aforesaid or by such other ways or means as they or he shall think fit raise and levy or borrow and take up at interest the full sum of 20,000*l.* and stand and be possessed thereof upon such trusts as are hereinafter declared (that is to say) *As to one fourth part thereof upon such trusts as are hereinafter declared touching the sum of 20,000*l.* Three and a-half per Centum Consolidated Bank Annuities hereinafter bequeathed in trust for the benefit of my son W. F. Hindle his wife children and issue as hereinafter mentioned* As to one other undivided fourth part thereof upon such trusts as are hereinafter declared touching the sum of 20,000*l.* Three per Cent. Reduced Consolidated Bank Annuities hereinafter bequeathed in trust for the benefit of my daughter *Elizabeth Hay* her husband and children

children and issue And as to one other fourth part thereof upon such trusts as are hereinafter declared touching the sum of 20,000*l.* Three per Cent. Reduced Consolidated Bank Annuities hereinafter bequeathed in trust for my daughter *Anne Murray Frances Mary Hindle* her husband children and issue And as to the remaining fourth part thereof upon such trusts as are hereinafter declared touching the sum of 20,000*l.* Three per Centum Reduced Consolidated Bank Annuities hereinafter bequeathed in trust for my daughter *Maria Hindle* her husband children and issue."

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The testator next proceeded to confer certain powers with reference to his devised estates, and then directed as follows:—"And I direct the said *George Jacson* and *James Pedder* and the survivor of them and the executors administrators and assigns of such survivor to stand possessed of the sum of 20,000*l.* Three-and-a-half per Centum Consolidated Bank Annuities upon trust that they my said trustees and the survivor of them and the executors administrators and assigns of such survivor do and shall pay the dividends interest and annual produce of the said sum of 20,000*l.* Three-and-a-half per Centum Consolidated Bank Annuities to my son *W. F. Hindle* and his assigns during his life and after his decease in trust during the widowhood of *Elizabeth* his wife to pay her out of the interest dividends and annual produce of the said sum of 20,000*l.* Three-and-a-half per Cent. Consolidated Bank Annuities the clear yearly sum of 200*l.* but if she shall marry again then after her second marriage to pay to her separate use free from the debts and engagements of any her future husband the clear sum of 100*l.* only during the then remainder of her natural life the first of such payments to be made at the end of one calendar month after the death of my said son *W. F. Hindle.*"

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The will then contained a further trust as to the sum of 20,000*l.* Three-and-a-half per Cent. Consolidated Bank Annuities, from and after the death of the testator's son *W. F. Hindle* subject to the said provision for *W. F. Hindle's* wife during her widowhood and life, for all and every or such one or more of the child or children of *W. F. Hindle*, and to be paid to them at such times and more than one in such shares with such conditions and limitations over being for the benefit of some or one of them as *W. F. Hindle* should by deed or will direct, appoint and in default of and subject to any such direction and appointment in trust for all and every the child and children of *W. F. Hindle* in the manner in the will in that behalf mentioned.

The will next proceeded to provide as follows:-  
 "Provided always that if there shall not be any child of the said *W. F. Hindle* or if there shall be any such child and all such children shall die being sons under the age of twenty-one years or being daughters under that age and unmarried or if all or any part of the said sum of 20,000*l.* Three-and-a-half per Cent. Consolidated Bank Annuity shall not become vested in or belong to such children then the trustees shall be possessed of the said sum of 20,000*l.* Three-and-a-half per Cent. Consolidated Bank Annuity or so much thereof as shall not have become vested in or belong to such children upon trust as to the sum of 20,000*l.* Three-and-a-half per Cent. Consolidated Bank Annuity to pay part thereof for such person or persons and in such parts and shares and proportions and for such estate or estates and interest or interests as my said son *W. F. Hindle* by his last deed or deeds writing or writings with or without power of revocation to be sealed and delivered by him in the presence of and to be attested by two or more credible witnesses or by his last will and testament or any codicil thereto to be by him signed and published in the presence

of and to be attested by three or more such witnesses shall direct or appoint."

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And the testator disposed of the residue of the sum of 20,000*l.* to and in favour of his children, grandchildren, and more remote issue, as therein expressed : he then directed as follows :—" I direct the said *George Jacson* and *James Pedder* and the survivor of them to stand possessed of the sum of 20,000*l.* Three per Cent. Reduced Consolidated Bank Annuities in trust from time to time during the natural life of my daughter *Elizabeth Hay* to pay the dividends interest and annual produce of the said sum of 20,000*l.* Three per Cent. Reduced Consolidated Bank Annuities as the same shall accrue and without anticipation into the proper hands of her the said *Elizabeth Hay* or to such person or persons as she in writing with her proper hand shall notwithstanding her present or any future coverture appoint for her sole and separate use free from the power control debts and engagements of any her husband and for which her own receipts signed with her hand shall from time to time be a good and effectual discharge and from and after her death in case she shall leave a husband her surviving to pay to such husband during the remainder of his life out of the interest dividends and annual produce of the said sum of 20,000*l.* Three per Cent. Reduced Consolidated Annuities such annual sum not exceeding the annual sum of 300*l.* as she my said daughter *Elizabeth Hay* shall by any last will and testament in writing or any writing in the nature of a will to be by her signed in the presence of three or more credible witnesses appoint and in default of appointment the annual sum of 300*l.* and from and immediately after the decease of the said *Elizabeth Hay* then as to the said sum of 20,000*l.* Three per Cent. Reduced Consolidated Bank Annuities subject to the provision for her husband as aforesaid upon trust for all and every or such

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such one or more of the child and children of the said *Elizabeth Hay*" as therein mentioned: "Provided always that if there shall not be any child of the said *Elizabeth Hay* or if there shall be any such children and all and every such children being sons shall die without issue before they shall attain their ages of twenty-one years or being daughters shall die before they shall attain their ages of twenty-one years without having been married or if all or any part of the said sum of 20,000*l.* Three per Cent. Reduced Bank Annuities shall not have become vested in or belong to such children then the said trustees shall be possessed of the said sum of 20,000*l.* Three per Cent. Reduced Consolidated Bank Annuities or so much thereof as shall not have become vested in or belong to such children upon trust as to the sum of 2,000*l.* part thereof for such person or persons and in such parts shares and proportions and for such estate or estates interest or interests as my said daughter *Elizabeth Hay* notwithstanding coverture by any deed or deed writing or writings with or without power of revocation to be sealed and delivered by her in the presence of and to be attested by two or more credible witnesses or by her last will and testament or any codicil thereto or any writing in the nature thereof signed and published in the presence of and to be attested by three or more such witnesses shall direct or appoint and as to the residue of the said sum of 20,000*l.* Three per Cent. Reduced Consolidated Bank Annuities (and also as to the said sum of 2,000*l.* Three per Cent. Reduced Consolidated Bank Annuities part thereof) in default of such appointment aforesaid or so much thereof as shall not be so appointed in trust for and to be divided amongst such other of my children grandchildren or more remote issue and to go and be paid to him her or them at such time or times and in such shares and proportions and with such provisions conditions and limitations over (such limitations

over

over being for the benefit of some or one of them) as my said daughter *Elizabeth Hay* shall by any deed or deeds writing or writings with or without power of revocation to be sealed and delivered by her in the presence of and to be attested by two or more credible witnesses or by her last will and testament or any codicil thereto or writing in the nature thereof to be by her signed and published in the presence of three or more credible witnesses notwithstanding coverture direct or appoint and as to the whole if no such appointment shall be made or so much thereof as shall not be so appointed upon trust for and to be divided amongst such other my children grandchildren and more remote issue (exclusive of my son *John* and his issue) as shall be living at the death of my said daughter *Elizabeth* share and share alike the grandchildren and more remote issue to stand in the place of their respective parents and to take equally amongst them if more than one such share only as their respective parents would if living have taken."

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The testator then directed the same trustees to stand possessed of a further sum of 20,000*l.* Three per Cent. Reduced Consolidated Bank Annuities upon trusts in favour of his daughter *A. M. F. M. Hindle* and any husband who might survive her and her children, similar to those above mentioned with reference to the sum of stock given in favour of *Elizabeth Hay* her husband and children, with remainder in the event of no son of *A. M. F. M. Hindle* attaining twenty-one and daughter attaining twenty-one or marrying as to 2,000*l.*, part of the 20,000*l.* stock, as she by deed or will should appoint, and as to the residue thereof upon trusts in favour of the testator's children, grandchildren and more remote issue as therein expressed. The testator then directed the same two trustees to stand possessed of the further sum of 20,000*l.* Three per Cent. Reduced Consolidated Bank Annuities

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Annuities upon trusts for the benefit of his daughter *Maria Hindle* her husband and children, with power to dispose of 2,000*l.* stock part thereof; and he disposed of the residue thereof, in the event of no son attaining twenty-one or daughter attaining twenty-one or marrying upon trusts similar to those above mentioned in respect of the 20,000*l.* stock given in favour of *Elizabeth Hay* her husband and children.

The testator then, after giving certain legacies, proceeded as follows:—"And whereas my son in law Captain *Hay* is now the eldest captain of his regiment and may be desirous when an opportunity offers to purchase a majority or a lieutenant-colonelcy now I do authorize and empower my trustees to advance and let to my said son in law on his own bond forth and out of the 20,000*l.* Three per Centum Reduced Consolidated Bank Annuities which I have hereinbefore given for the benefit of my daughter *Elizabeth Hay* and her family (in case she shall by any writing under her hand desire the same to be done) for and towards the purchase of a majority for my said son in law in his present or any other regiment in His Majesty's service any sum not exceeding 2,000*l.* and for and towards the purchase of a lieutenant-colonelcy any further sum not exceeding the further sum of 2,000*l.* to be given to the said trustees out of the said sum of 20,000*l.* Three per Centum Reduced Consolidated Bank Annuities from whence such sums shall be advanced and to be conditioned for the payment of the principal and interest by my said son in law in case he shall sell his said commissions or to be paid at his death which shall first happen Provided always and I do hereby declare my will and mind to be that in case my said son in law shall survive his said wife and my said trustees shall have advanced to him any sum or sums of money under the power last hereinbefore contained

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shall be lawful for my said trustees to deduct from the annual sum payable to my said son in law interest after the rate of 4*l.* per cent. per annum upon the sum or sums of money to be lent for the purposes aforesaid until such sum or sums of money shall be repaid to my said trustees."

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And the testator gave the residue of his personal estate unto *G. Jacson* and *J. Pedder* upon trust, with such consent as therein mentioned, to lay out the same in the purchase of fee simple estates, which should be conveyed and settled by the vendors to such and the same uses upon such and the same trusts and to and for such and the same ends intents and purposes and charged and chargeable in the same manner and with and under the same powers provisoes declarations and agreements as were by that his will contained expressed and declared of and concerning his real estates or such and so many of them as the deaths of parties and other contingencies would then admit, followed by a direction for the investment in stock of such residuary personal estate and for the application of the income thereof until so laid out in land. And the testator appointed *G. Jacson* and *J. Pedder* the executors of his will.

The testator made five codicils to his will. By the first he varied the provisions made by his will for his son *W. F. Hindle* during his life, and made certain provisions for the wife and children of *W. F. Hindle* to take effect during *W. F. Hindle's* life ; but he did not by this or any other codicil vary the provisions made by his will for *Elizabeth Hindle*, and which were to take effect after the death of *W. F. Hindle* and during her widowhood and after her second marriage. By the third codicil, he appointed his eldest son, *J. F. Hindle*, to be a trustee of the portions and provisions of his the testator's several younger children and their respective families, and an executor under his will jointly with *G.*

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*Jacson* and *J. Pedder* : and by the fourth codicil he directed the legacies given by his will to be paid free from legacy duty.

The testator died on the 5th *July* 1831. *J. F. Hindle*, the son, died on the 7th *February* 1849, without having had any issue; and *W. F. Hindle* died on the 1st *April* 1853, leaving his widow, *Elizabeth Hindle*, and two daughters, who had both attained twenty-one, him surviving, and having had other children, two sons and a daughter, who died in his lifetime infants and without having been married.

The Plaintiff in the Special Case was *Elizabeth Hindle* the widow of *W. F. Hindle*. The Defendants were, first, *John Taylor*, *William Whalley* and *H. M. Fielden*, the trustees who had succeeded to *J. C. Johnson*, *H. Custance* and *J. F. Hindle*, the trustees appointed by the will and third codicil; secondly, *C. R. Jacson* and *J. Eccles*, the trustees who had succeeded to *G. Jacson* and *J. Pedder*, the trustees appointed by the will; and thirdly, the two daughters of *W. F. Hindle* and the husband of one of them who was married. The following were the questions agreed to be submitted for the opinion of the Court :—First. Is the Plaintiff entitled to receive payment during her widowhood, under the trusts of the will of *John Fowden Hindle* the elder, of two yearly sums of 200*l.* each, one of them payable under the trusts relating to the sum of 20,000*l.* Three-and-a-half per Cent. Consolidated Bank Annuities, since converted into Three-and-a-quarter per Cent. Bank Annuities, and now vested in the Defendants *J. Taylor*, *W. Whalley* and *H. M. Fielden*, and the other of them payable under the trusts relating to the one-fourth part of the sum of 20,000*l.* directed to be raised by the Defendants *C. R. Jacson* and *J. Eccles*, except only so far as she has already received  
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payment of the first-mentioned of the yearly sums ; or is the Plaintiff's right limited to receiving payment during her widowhood of only one yearly sum of 200*l.* ; and if so, is it charged upon both the said trust funds, and out of which of them ought it to be primarily or exclusively paid ? Secondly. Is the capital of the one-fourth part of the sum of 20,000*l.* or of the Bank Annuities purchased therewith applicable to the payment to the Plaintiff of the yearly sum which now is or hereafter may be charged thereon, in case the interest dividends and annual produce of the principal sum shall prove insufficient for the purpose ; or what are the rights and remedies of the Plaintiff in respect of any deficiency which may exist in the interest dividends and annual produce of the principal sum towards satisfaction of the last-mentioned yearly sum ?

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The Special Case came on for hearing before the Master of the Rolls on the 15th *March* 1855, when his Honor made an Order, declaring, first, that the Plaintiff was entitled under the trusts of the testator's will to receive payment during her widowhood of two yearly sums of 200*l.* each ; secondly, that, in the event of the Plaintiff marrying again, she would be entitled after her second marriage and during the remainder of her life to receive payment of two yearly sums of 100*l.* each ; thirdly, that one of such yearly sums of 200*l.* during widowhood, and of 100*l.* in the event of and after her second marriage, was payable to the Plaintiff out of the yearly dividends and income of the sum of 20,000*l.* £3 : 10*s.* per Cent. Bank Annuities specifically bequeathed for the benefit of *W. F. Hindle* deceased and his wife children and issue, and since the testator's death converted into the like sum of New Three per Cent. Bank Annuities, and then vested in the Defendants *J. Taylor W. Whalley* and *H. M. Fielden* as trustees ;

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trustees; fourthly, that the other of the said yearly sums of 200*l.* during widowhood, and of 100*l.* in the event of and after her second marriage, was payable to the Plaintiff out of the yearly dividends and income (so far as the same would extend), which had arisen or might arise from the present or any future investment of the one-fourth part of the sum of 20,000*l.* raised under the trusts of the term of 500 years, and which had been invested in the purchase of 4,932*l.* 3*s.* 8*d.* £3 : 5*s.* per Cent. Annuities, and which had been since converted into New Three per Cent. Bank Annuities and were then vested in the Defendants *C. R. Jackson* and *J. Eccles* as trustees; and fifthly, that the capital of the one-fourth part of the sum of 20,000*l.*, either in its present or any future state of investment, was not and would not be applicable towards any deficiency which did or might exist during the life of the Plaintiff in the yearly dividends and income arising or to arise from such invested capital towards payment in full of such of her several annuities of 200*l.* or 100*l.* as then was or thereafter might be payable out of the yearly dividends and income of such invested capital. And was ordered, that the costs of all parties to the Specimen Case, as between solicitor and client, should be taxed that the Defendants *J. Taylor*, *W. Whalley* and *H. M. Fielden* should raise four-fifths of the total amount certified, together with the costs of raising the same, by sale of a competent part of the sum of 20,000*l.* New 3*l.* per Cent. Bank Annuities then vested in them and that the Defendants *C. R. Jackson* and *J. Eccles* should raise the remaining one-fifth of the total amount certified, together with the costs of raising the same, by sale of a competent part of the sum of 4,932*l.* 3*s.* 8*d.* New 3*l.* per Cent. Annuities then vested in them.

A report of the case, as heard before the Master ■  
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the Rolls, will be found in the 20th Volume of Mr. *Beavan's* Reports, page 109.

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The Defendants, the two daughters of *W. F. Hindle* and the husband of one who was married, appealed against the decision of the Master of the Rolls, praying that the order might be reversed as to the first, second and fourth declarations, and that the direction as to costs might be varied by directing the costs to be paid by the Plaintiff.

The *Solicitor-General* and Mr. *Harris Prendergast*, for the Appellants.

They submitted that the mode in which the Master of the Rolls had construed the will was not accurate, his Honor having read it as if the trusts contained in the gift of the 20,000*l.* £3 : 10*s.* per Cent. Annuities were annexed to the previous bequest of the fourth of the 20,000*l.* They contended that there was a gift of one annuity only, and that to convert the words used into a gift of two annuities was to contravene the testator's design, and to employ the machinery he had adopted not in favour of but against his real intention. They referred to the various clauses of the will above set out, as showing that the view of the Appellants was correct.

Mr. *R. Palmer* and Mr. *Little*, for the Plaintiff, supported the decision of the Master of the Rolls.

Mr. *Pole* appeared for the Trustees, and took no part in the argument.

*The LORD CHANCELLOR.*

I will not finally dispose of this case till I have had a little more opportunity of considering it; but I must own that my impression is adverse to the decision of the Master of the Rolls. One cannot help feeling a little influenced

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influenced by the extreme improbability that a person, meaning to give an annuity in the way the testator was doing here, should so give it as by a side-wind to exhaust the whole of the fund (in the case of the other daughters it would go greatly beyond exhaustion): I do not say that that is conclusive; and if there were nothing but that, though I might have speculated that the decision would probably be adverse to the real intention, I might have held myself bound by the language used and been guided by it. With all deference however to the Master of the Rolls, I concur with the Solicitor-General in thinking that it by no means necessarily follows that the words, "such trusts as are hereinafter declared," are to be read as if the trusts so referred to were then stated. If they had been stated, no doubt would of course have remained; but I incline to think that the real way of reading the bequest is, when the testator mentions the trusts of the one-fourth by reference to the other trusts, to read it as if it had come in immediately before the declaration of the other trusts. Thus, the trust of the 20,000*l.* being, "I direct the said *George Jacson* and *James Pedder* and the survivor of them and the executors administrators and assigns of such survivor to stand possessed of the sum of 20,000*l.* Three-and-a-half per Centum Consolidated Bank Annuities upon trust," &c, suppose it had been to this effect, "I direct *Johnson* and *Custance*, (the other two trustees,) and the survivor of them to stand possessed of 5,000*l.* being one-fourth of the 20,000*l.* and *Jacson* and *Pedder* and the survivor of them to stand possessed of the 20,000*l.* Three-and-a-half per Centum Annuities on trust to pay the interest and dividends of those respective sums to *W. F. Hindle* and his assigns during his life and after his decease in trust during the widowhood of *Elizabeth* his wife to pay her," not as it is in the will, but "out of the interest dividends and annual produce of the 5,000*l.*"

5,000*l.* and of the 20,000*l.* a sum of 200*l.*," I think that, without any violence to the language, that is as legitimate a mode of interpreting the expression "such trusts" as that which the Master of the Rolls has adopted. If that is so, it follows that the charge is not doubled, which it is if the Master of the Rolls' way of reading the words is the correct one. The question lies in the very narrowest compass, and I confess that, as at present advised, my opinion is, that the construction which has been contended for by the Solicitor-General is correct, and that the clause must be read in the way that I have put it, that is as if, instead of the trusts being declared of the 20,000*l.* in the names of the second set of trustees only, they had been declared of that 20,000*l.* and also of the 5,000*l.* in the names of the other trustees, making the produce of the respective funds applicable in the mode there mentioned. There is no doubt the difficulty of its being uncertain which fund is to contribute to the annuity, but that is immaterial, because if the larger fund was adequate there would be no practical difficulty. The real difficulty in this case is in the language; but I am fortified in the construction which I am inclined to adopt by the consideration, that the testator could hardly have contemplated that the annuitant would with certainty get 200*l.* a year out of the interest of the 5,000*l.* (the 300*l.* a year given to the other daughters could not possibly have been obtained). I think the construction is also a little aided by the power to lend the money, though I agree that there is great weight in what was said, that that power is hardly to be called a part of the trusts, but merely authority to the trustees to invest a particular portion of the money in a particular mode.

I will, however, mention the matter again on *Friday*,  
 F I should see any occasion to alter my view. The  
 V ol. V. R R D. M. G. question

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question entirely depends upon whether the trusts are to be considered as repeated, whether, if I may use the expression, they can be said to be incorporated a second time in the prior portion of the will, or whether that is not to be read as introducing the trusts of the 20,000 by saying that the trustees of the 5,000*l.* are to stand possessed of the 5,000*l.*, and the trustees of the 20,000 are to stand possessed of the 20,000*l.* on the trusts after mentioned.

Nov. 9.

*The* LORD CHANCELLOR.

I desired this case to be put in the paper this morning, but I have little or nothing to add to what I before said. I have again considered and looked into the language of the will, and have considered the principle at which such cases must be decided, and I see no reason to alter the opinion I expressed at the close of the argument, namely, that in this case, at all events, indeed I believe I should say in almost all cases, it is not a reasonable way of reading a trust, created by reference to other trusts, to consider everything as there repeated and so to make it a duplication, as it were, of trusts in the nature of charges. His Lordship then repeated his former statement of the way in which he thought the language of the will should be dealt with, and added—I think that is the only legitimate mode of reading the will, and the consequence is, that there is only one annuity payable; and, in that respect, therefore, I differ from the decision of the Master of the Rolls, and that order will be corrected accordingly. With regard to the costs, as it is a family suit, I think they must come out of the residue.

A discussion then followed as to the costs, it appearing  
that

**that** the testator's estate had been fully administered, **with** the exception of a sum of about 100*l*.

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**Mr. R. Palmer** submitted, that this being a Special Case, presented with the consent of the parties, all the costs ought to come out of the fund in question, namely, the 25,000*l*.

The Solicitor-General insisted that the rule was, that although whatever remained unadministered might be applied in payment of the costs, because the expense of construing a testator's will was part of the administration, yet where there was no unadministered estate, a fund could not be recalled for the purpose of paying costs. He submitted, therefore, that the right mode would be to allow the Trustees to retain their costs in the first instance out of the unappropriated residue, then to pay the costs of the Appellants, and finally, if anything should remain, to apply it to the costs of the other parties.

The LORD CHANCELLOR admitted the general rule to be as stated by the Solicitor-General, and, observing that the case was clearly one where, for the sake of all parties, a difficulty had to be removed, directed that out of the residue the Trustees should have their full costs first, and then that anything which remained should go, not in the first instance to the Appellants, but rateably, as far as it would extend, to satisfy the costs of both Appellants and Respondents.



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November 13.

Before The  
Lord Chan-  
cellor LORD  
CRANWORTH.

The Plaintiff employed a broker to sell railway shares, and the broker employed an auctioneer, who sold the shares by auction to the Defendant. A few days after, the Defendant employed the same auctioneer to re-sell the shares, which were accordingly sold by him to a third party, whose name was handed in to the Plaintiff's broker for the purpose of preparing the deed of transfer, which was thereupon executed by the Plaintiff conveying the shares to such third party, who refused to complete

## SHAW v. FISHER.

THE bill in this suit was filed by *William Shaw*, to compel the Defendant, *Robert Fisher*, to execute or procure to be executed and registered, a proper transfer or conveyance from the Plaintiff of twenty-five shares in the *Newry and Enniskillen Railway Company* which had been purchased by the Defendant and afterwards resold by him to a person of the name of *Carmichael*, and to indemnify the Plaintiff against the costs and expenses already incurred by reason of the Defendant not having executed and registered such transfer.

When the cause came on to be heard before the Vice-Chancellor *Knight Bruce*, on the 26th January 1848, was referred to the Master to report whether the Plaintiff could make a good title to the shares in question, and if the Master should find that a good title could be made he was to state when such good title was first shown; and if he should find that a good title was not shown before the filing of the bill, he was to state under what circumstances it happened that such good title was not shown; and if he should find that the Plaintiff could not make a good title, he was to state whether it was by reason of any and what act or acts done by him since the sale, and the nature of such act or acts, and under what circumstances the same took place.

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the contract by registering the shares in his name. One year after this sale, during which time the Plaintiff was ignorant that the Defendant had been the original purchaser, (the shares remaining in the Plaintiff's name and calls having been made,) he filed his bill for specific performance against the Defendant:—*Held*, that having executed the deed of transfer to the third party, the privity of contract between the Plaintiff and Defendant no longer existed, and the bill was accordingly dismissed.

The decree also directed an inquiry as to whether any and what calls had been duly made in respect of the twenty-five shares, and to what amount and under what circumstances, and whether the Plaintiff was liable to pay such calls, and whether any and which of them had been paid, and by whom; and the Master was to be at liberty to state special circumstances. Further directions and costs were reserved.

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The Master, by his report, found, that on the 22nd *September* 1845, the Plaintiff delivered at the office of the *Newry and Enniskillen* Railway Company 100 scrip certificates for 100 shares in the Company, numbered, &c., and claimed to be registered as proprietor of such shares; and that thereupon the Plaintiff was registered as a shareholder in respect of such scrip by the entry in a book of the Company called the Rough Draft Scrip Registration Book, of the name of the Plaintiff, and opposite thereto of the numbers of the scrip certificates for 100 shares so delivered for registration, which book was the only book which the Company then or at any time prior to the month of *January* 1846 kept for the registration of the holders of scrip certificates for shares in the Company, and that the Plaintiff was not at any time in the month of *November* 1845 interested in any other shares or scrip certificates for shares in the Company; that in the latter part of *October*, or early in *November* 1845, the Plaintiff employed *Abraham De Horne*, stock-broker, to sell the shares, and that *A. De Horne*, not being able to effect a sale of the shares on the Stock-Exchange, accompanied the Plaintiff to Messrs. *Lamond*, of the Hall of Commerce, auctioneers, and gave instructions to Messrs. *Lamond* to sell the shares at their public auction, which was to take place on the 7th *November* 1845, and that the shares were accordingly put up for sale by auction by the Messrs. *Lamond* on the 7th *November*

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November 1845, and that at such sale the Defendant bid for and became the purchaser of lot 152, consisting of twenty-five of the 100 shares, at the price of 28s. 6d. per share; that a person named *Franklin* became the purchaser of fifty other of such shares at the same price, and that a person named *Fitzgerald* became the purchaser of the remaining twenty-five of such shares also at the same price, and that subsequently to the sale by auction, and on the 11th November 1845, the twenty-five shares so sold to *Fitzgerald* were by his direction again put up for sale by auction by Messrs. *Lamond*, and were purchased by one *Wm. Heath* at 35s. per share; and that on the 21st November 1845 the twenty-five shares so purchased by the Defendant were by his (the Defendant's) direction again put up for sale by auction by Messrs. *Lamond*, who at the same time again put up for sale, by the direction of *Franklin*, the fifty shares which had been so sold to him, and that at such last-mentioned sale a person named *John Carmichael* bid for and became the purchaser, as well of the last-mentioned twenty-five shares as of the fifty shares, making together seventy-five shares, at the rate of 32s. per share, and that, on the 20th November 1845, the name of *Wm. Heath* was furnished by Messrs. *Lamond* to *A. De Horne*, the broker of the Plaintiff, as the name of the purchaser of the twenty-five shares so purchased by *Wm. Heath* at the rate of 28s. 6d. per share; and that, on the 24th November 1845, the name of *John Carmichael* was also furnished by Messrs. *Lamond* to *A. De Horne*, the broker of the Plaintiff, as the purchaser of the seventy-five shares at the rate of 28s. 6d. per share; that, on the 27th November 1845, Messrs. *Lamond* paid to *A. De Horne* the purchase-money for seventy-five shares at the rate of 28s. 6d. per share. The Master certified that no evidence whatever had been laid before him to show, and that it did not appear, that the names or name of the Defendant

Defendant *Fisher, Franklin* or *Fitzgerald*, or any or either of them, were or was furnished by Messrs. *Lamond* to *A. De Horne* or to the Plaintiff, or that *A. De Horne* and the Plaintiff, or either of them, were or was made acquainted with or had knowledge of the fact that the 100 shares had been in the first instance sold to the Defendant, *Franklin* and *Fitzgerald*, or that the shares had been a second time put up to sale in manner thereinbefore mentioned; that on or before the 27th *November* 1845 a deed of transfer of the whole of the seventy-five shares from the Plaintiff to *John Carmichael*, as the person whose name was so returned to *A. De Horne* by Messrs. *Lamond* as the purchaser thereof, was prepared in the office of the said *A. De Horne*, as the broker of the Plaintiff, and was executed by the Plaintiff, and that such deed of transfer when so executed by the Plaintiff was forwarded by *A. De Horne* to Messrs. *Lamond* in order that the same might be handed over to *John Carmichael*; and that a transfer deed of the twenty-five shares from the Plaintiff to *William Heath*, whose name was so returned to *A. De Horne* by Messrs. *Lamond* as the purchaser, was prepared in like manner by *A. De Horne*, and was executed by the Plaintiff, and was forwarded by *A. De Horne* to Messrs. *Lamond*; and that, until at or about the beginning of the month of *January* 1846, when the registration of shares in the Company was completed, there was not any entry or register of transfers of shares made or kept by the Railway Company except so far as the memoranda of transfers thereafter mentioned to have been made in the book marked A. might be considered as entries or registers of transfers, and that after the 12th *January* 1846, when the registration of transfers of shares was commenced in Book E., such deeds of transfer as were left in the office of the Company for registration were not ever again delivered out, but were retained

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retained by the Company, and were pasted into a book kept for that purpose; and that when deeds of transfer were taken to the office for registration, before the registration of shares was completed, such deeds of transfer were not registered, but were returned to the person bringing the same, and that in some cases (at the request of the persons producing such deeds of transfer) endorsements were made by one of the clerks of the Railway Company upon the same, to the effect that certificates of the shares of which the deeds respectively purported to be transfers were in the office of the Company and memoranda of the names of the parties to such deeds of transfer and of the number of shares thereby transferred were entered in the book marked A. entitled *Rough Draft Scrip Registration Book*; and that sometime in the month of *November 1846*, and before the registration of the shares in the Company was completed, the transfer deed of the said twenty-five shares to *William Heath* was taken to the office of the Railway Company in order to the same being registered, and that in a few days afterwards the deed of transfer of the seventy-five shares to *John Carmichael* was also taken to the office for the same purpose; that the time when such deeds of transfer were so taken to the railway office for the purpose of registration there was not, nor was there until the 12th *January 1846*, any register of the transfer of shares kept by the Railway Company, excepting so far as the book marked A. might be considered a register of transfers; and that the deeds of transfer to *William Heath* and *John Carmichael* were not left at the office but were returned to the person producing the same, and that memoranda of the particulars of the transfers were made by *J. D. Johnstone*, clerk of the company, in the book marked A., with entries were in the words and figures following, that

to say:—“ *Wm. Shaw*, surgeon, *Hampstead*, transfer 25 shares to *Wm. Heath*, solicitor, 3, *East Place, Hackney, Middlesex*,” and “Same, 75 shares, *John Carmichael*, merchant, of *Riverstown House, Cork*.”

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The Master also found that entries of the names of the holders of scrip in the Company, and of the total number of scrip and the numbers designating the scrip so held by them, were contained at one end of the book marked A.; and that the memoranda so made by *J. D. Johnstone*, of the particulars of the deeds of transfer from the Plaintiff, with several other entries of like nature, were made at the other end of the book, the book having been reversed for the purpose of the different entries being made therein; and that there was no register of shareholders of the Company under the seal of the Company until the 27th February 1846.

The Master also found that the deed of transfer, executed by the Plaintiff, of the twenty-five shares, so sold to *W. Heath*, was, on or about the 15th January 1846, registered at the office of the Railway Company, and that thereupon the twenty-five shares were transferred in the books of the Railway Company, from the name of the Plaintiff into the name of *W. Heath*; and that the deed of transfer executed by the Plaintiff of the seventy-five shares to *John Carmichael* had not been registered in the books of the said Company, except as far as the entry in the book marked A. might be considered a register thereof; and that the shares which were numbered 14646 to 14720, both inclusive, still continued registered in the name of the Plaintiff as the holder thereof.

The Master proceeded to state that, in 1816, two calls were

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were made ; that the Plaintiff was not an original allottee of the shares, and that at the time of making the first of such calls there was no sealed register of shareholders of the Company, but that at the time of making such second and the third and fourth calls respectively, thereafter mentioned, the name of the Plaintiff was on the sealed register of the Company. The Master certified, that, upon consideration of the several matters, he found that the Plaintiff could not make a good title to the twenty-five shares in the *Newry and Enniskillen Railway Company* which were comprised in lot 152, purchased by the Defendant at the sale by auction on the 7th *November 184* by reason of his having, under the circumstances therein before particularly stated, executed to *John Carmichael* the transfer of such shares so taken to the office together with the fifty shares so sold originally to *Mr. Franklin*; and that since the sale by auction four calls and no more had been made in respect of the twenty-five shares in question. After stating that the first of such calls was made before the sealing of the register of shareholders, the Master specified the amount of the calls, and found that under the circumstances the Plaintiff was liable to pay the second, third and fourth of such calls, but that he was not liable to pay the first of such calls ; that three of the calls had been paid by the Plaintiff, but not the fourth, which still remained unpaid, but that the Plaintiff was liable thereto.

When the cause came on to be heard on the 5th *July 1855*, before the Vice-Chancellor *Stuart* on further directions, his Honor dismissed the bill with costs, observing that, although the Plaintiff had at one time a right to insist upon a transfer to nobody but the Defendant *Fisher*, yet that, having agreed to execute a transfer and having executed such transfer to *Carmichael*, the privity of c  
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**tract** as between the Plaintiff and Defendant *Fisher* was **broken**, and that he the Plaintiff had acquired a new **right** as against *Carmichael*.

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The Plaintiff now appealed to the Lord Chancellor.

Mr. *Malins* and Mr. *Hallett*, for the Plaintiff, in support of the Appeal.

It is well settled that a bill for specific performance to purchase railway shares will lie, *Duncuft v. Albrecht* (a), and the only contention raised by the answer was, that the shares in question were scrip, and that, for such, specific performance will not lie, *Jackson v. Cocker* (b). When the cause came originally before the Vice-Chancellor *Knight Bruce* his Honor made a decree, substantially, in our favour, directing, at the Defendant's request, the usual reference as to title, and observing, "I think it very likely that, in the result, the Defendant will find himself fixed with the liability to take the shares; but he is entitled to have the details of a Chancery suit gone through" (c). That decree has not been appealed from, and therefore it stands so far as specific performance is concerned. It was not open to the Vice-Chancellor *Stuart* to question the decree in that respect. His Honor, however, has dismissed the bill, not on the ground of want of title in the Plaintiff, but because of the want of privity of contract between the Plaintiff and Defendant, which he thought was at an end when the Plaintiff agreed at the Defendant's request to transfer to his assignee. We submit, however, that the privity of contract, which undoubtedly existed between the Plaintiff and the Defendant, could not be affected by the refusal of

(a) 12 Sim. 189.

(b) 4 Beav. 59.

(c) 2 De G. & Sm. 11. See p. 14.



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of the assignee of the latter to complete, and that the moment when the name of the Defendant was given to the common agent for both parties, that moment the Defendant became liable to execute the assignment, procure himself to be registered, and to pay all calls made since the execution of the assignment by the Plaintiff and to indemnify the Plaintiff against all future calls. *Wynne v. Price (a)*. We further submit, that it would not have been competent for the Plaintiff to have refused compliance with the request of his vendee, the Defendant, to transfer to his nominee, and a disregard of that position seems to be the origin of the fallacy on which the defence to this suit is founded. The parties only to the original contract could be proper parties to a bill for specific performance, and if the Plaintiff had made the Defendant assignee a party he might have demurred, *Wood v. White (b)*. Thus, in the words of Lord Eldon, in the case of *Mole v. Smith (c)*, "When a bill is filed for specific performance it should not be mixed up with prayer for relief against other persons claiming an interest in the estate." The same principle was thus laid down by Lord Cottenham in *Tasker v. Small (d)*, "Before the contract is carried into effect the purchaser cannot against a stranger to the contract enforce equities attaching to the property." All that the Plaintiff has done in this case amounted to a mere ministerial act, which a trustee for his vendee he was bound to do, and as between the Plaintiff and the sub-purchaser there is in truth no privity of contract, and, for aught the Plaintiff knows, the sub-purchaser may have a valid defence, but with that the Plaintiff cannot have any concern. They also refer to the 15th sect. of the Act 8 Vict. c. 113, and to the form of transfer prescribed in that Act.

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(a) 3 De G. & Sm. 310.

(b) 4 Myl. & Cr. 460.

(c) Jac. 490. See p. 494.

(d) 3 Myl. & Cr. 63. See p. 7

**Mr. Wigram** and **Mr. Green**, for the Defendant, in support of the decree of the Vice-Chancellor.

The decree, which was originally pronounced by the Vice-Chancellor *Knight Bruce*, was not for specific performance unconditionally, and amounted to nothing more than a contingent declaration that the Plaintiff might be entitled if upon the enquiry directed before the Master a satisfactory title could be disclosed; but, in fact, the Master has found that the Plaintiff cannot make a good title, and therefore the decree which is appealed from, so far from being inconsistent with the decree of the Vice-Chancellor *Knight Bruce*, is obviously nothing more than a carrying out of the original decree to its natural conclusion from the facts as found by the Master. The Plaintiff must be assumed to have approved of the act of his agent in substituting *Carmichael* for the Defendant as the purchaser, and the Plaintiff cannot after that have recourse to the Defendant. We admit that it was optional with the Plaintiff, whether he would hold the Defendant bound or adopt *Carmichael*, but he cannot be heard to say after the lapse of twelve months, and after the execution of a solemn deed to *Carmichael*, that he has not abandoned his rights as against the Defendant, whose existence, according to the Master's finding, the Plaintiff was ignorant of until shortly before the filing of the bill. The Plaintiff also has placed some reliance upon the fact that the transfer to *Carmichael* has not been formally registered, but the Plaintiff is in this dilemma with respect to these shares; the bill states that he was the duly registered owner of the shares, but the Master has found that there was no sealed registration until four months after the bill was filed, and that the name of *Carmichael* was registered in the same book as that in which the Plaintiff's name originally appears; if therefore such registration is invalid, the bill, being for specific

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specific performance of an agreement to purchase scrip shares, will not lie, *Jackson v. Cocker* (a); if on the other hand the Plaintiff's shares were duly registered, so was the transfer to *Carmichael* as found by the Master.

Mr. *Hallett* in reply.

With respect to the ignorance of the Plaintiff as to the Defendant being his vendee, no argument can be drawn from that, because it was immaterial to the Plaintiff to know the name, and it was only when the difficulty as to registration was made by *Carmichael* that it became necessary for the Plaintiff to assert his rights against the person with whom the contract was originally made.

*The LORD CHANCELLOR.*

It seems to me that this is a case quite free from doubt. Mr. *Shaw*, the Plaintiff, must, I think, be taken to have been possessed of the twenty-five shares, the subject of this suit. A question might have been raised, whether these were shares; Mr. *Shaw* was originally entitled to them in the shape of scrip; he took that scrip to the office, and there they were entered in a book, and thereby he became the holder of shares; only twenty-five are now in question, and the Plaintiff sold them as being shares. Nor do I think it can be open to the Defendant to question that position on the present occasion. The Plaintiff then being so entitled, on the 7th November 1845, employed his broker, Mr. *De Horne*, who employed Messrs. *Lamond*, auctioneers, to sell these shares, and they sold them to the Defendant at 28s. 6d. per share. If the matter had stopped there, I think, upon the principles of this Court, on that day (or whatever time, according to the ordinary practice of the Stock Exchange, is considered

(a) 4 *Beav.* 59.

sidered sufficient to engraft a transaction of this kind into a contract) the Defendant became obliged to complete, and at that time Mr. *Shaw* was entitled to file a bill against the Defendant to compel him to complete that contract ; but, in the meantime, Messrs. *Lamond*, the auctioneers and agents of the Plaintiff on the original sale of these shares, act as agents for the purchaser, Mr. *Fisher*, in a subsequent sale of the shares, which he had purchased, to another person of the name of *Carmichael*, and before that sale took place they the auctioneers had not communicated to Mr. *Shaw*, the Plaintiff, the name of the person who had become the purchaser. I suppose that is often not done for some time. It was said, and I dare say truly, that such sales frequently go on one after another until a purchase by some one intending to hold takes place. In this case there was one transaction beside the original sale to Mr. *Carmichael*, and no communication appears to have been made by Mr. *Shaw* to Mr. *Fisher*, but it appears to have been made to Mr. *Carmichael*. If Mr. *Carmichael* was as solvent a man as the Defendant Mr. *Fisher*, it could have made no difference to Mr. *Shaw* whether he transferred to the one or to the other, so as to exonerate him from the future calls and enable him to get his money. A small part of the interest, in the subject matter of this suit (irrespective of the calls), I suppose he got immediately paid to him by Mr. *Carmichael* after he had bought, and as if he, Mr. *Carmichael*, had been the purchaser, and thereupon he executed a deed to Mr. *Carmichael*, transferring the shares to him, and treating him as being the purchaser. Mr. *Carmichael* has since absconded, or refuses to complete. Right or wrong the Company refuse to surrender this transfer, so that Mr. *Shaw* is still liable thereupon, and he consequently files his bill against Mr. *Fisher*. No doubt, unless there be some defence made, he was entitled to a specific performance

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formance against Mr. *Fisher*. Mr. *Fisher* is the person with whom he contracted, and when the case was heard before the Vice-Chancellor *Knight Bruce* his Honor made a decree, not in terms declaring the Plaintiff entitled to a specific performance, but, I think, substantially making a decree which involved that, and so far introduced into the decree a declaration that the Plaintiff was entitled to a specific performance, and it was referred to the Master to report whether a good title could be made, and then was added this specialty,—that if the Master should find that a good title was not shown before the filing of the bill, he was to state under what circumstances it happened that such good title was not shown, and if he should find that the Plaintiff could not make a good title he was to state whether it was by reason of any, and what act or acts done by him since the sale, and the nature of such act or acts, and under what circumstances the same took place. That being the reference, the Master found that the Plaintiff could not make a good title. It is plain that, at one time, the Plaintiff could have made a good title, because he was entitled to these twenty-five shares as shares in the sense in which he had undertaken to sell shares. The Master however reports, in stating this transaction, that the Plaintiff had disqualified himself from making a good title to the shares in question, because he had conveyed them away to another person. Now that, to my mind, is a complete answer. The Plaintiff cannot make a title to these shares to Mr. *Fisher*, because he has already assigned them to Mr. *Carmichael*. Then it is said Mr. *Carmichael* has not completed. What does that signify? As far as Mr. *Shaw* is concerned he has executed the deed, and there is nothing to prevent Mr. *Carmichael* at any time coming with that deed and registering it. Therefore it is plain, the Plaintiff cannot now make a title.

It

It struck me at one time as possible that there might be no defence, because if the assignment to Mr. *Carmichael* had not been an assignment by way of transfer to him, but merely an assignment at the instance of the purchaser, who might have said,—“I wish you to convey these shares to Mr. *Carmichael* for me, in pursuance, as it were, of some arrangement between me and Mr. *Carmichael*,”—that might have been no bar to any relief against Mr. *Fisher*, because what the Plaintiff had been doing would have been as it were in the capacity of agent of the person from whom Mr. *Carmichael* purchased. But that is not the history of this transaction. It may be that Messrs. *Lamond* are responsible (I do not mean to say that they are) for having got an improper purchaser for the person for whom they were acting, and in not supplying the right name; in truth, what they did was to tell Mr. *Shaw* that Mr. *Carmichael* was the purchaser from him. The name of Mr. *Fisher* does not appear to have been mentioned, as far as can be ascertained, for nearly a twelvemonth afterwards. It is quite clear, a transfer to Mr. *Carmichael* was made upon the footing that Mr. *Carmichael* was the person who had purchased from the Plaintiff, and as such entitled to the transfer. It appears to me that that circumstance puts an end to the case. I do not assent to the position, that the Defendant was concluded by the original decree of the Vice-Chancellor *Knight Bruce*. That decree only declared that there should be a specific performance if the Plaintiff could make a title. The Vice-Chancellor directed the reference in the way I have already adverted to, splitting it into two questions, first, whether the Plaintiff ever could make out a good title, and, if he could, whether he had subsequently disqualified himself? I entirely concur in the judgment of the Vice-Chancellor *Stuart*, and I think that the bill was properly dismissed; and therefore this appeal must be dismissed with costs.

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A tenant for life discharging an incumbrance upon the estate is presumed to have intended to keep the charge alive against the inheritance for his own benefit, and the absence of an assignment will not conclude him; but a similar presumption does not arise from the payment by a tenant for life of bond debts, which, even if assigned, only place him in the same position as any other bond creditor.

A testator, being indebted by bond, devised certain real estate to his son with remainder, subject to a term for the payment of legacies, to his grandchild, and died. Upwards of twenty years after the date of the latest of the legacies, the legatee for value filed their bill against the tenant for life and his assignee for value, alleging that the tenant for life had paid off the bonds, and stand in the shoes of the obligees as against the inheritance. The tenant for life pleaded the Statute of Limitations, the other legatees did not:—*Held*, that the payment of the bonds by the tenant for life did not constitute him an incumbrancer of the estate, and that the bonds themselves, being more than twenty years old, the presumption was that they had been satisfied.

*Semble*, the plea of the Statute of Limitations, under the circumstances, was good, as the tenant for life, enured for the benefit of all the defendants.

In June 1854, the tenant for life made an affidavit, verifying payment of the legacies, and died in August following: a supplemental suit was instituted by the Plaintiff, who, in February 1855, filed the affidavit in the original and supplemental suits; the Lord Chancellor, in the absence of any motive attributable to the Plaintiff for not having filed the affidavit in the interval between the date of its being made and the death of the deponent, received it with some qualification.

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HARLAND v. MORLEY.

THIS was a motion on behalf of the Plaintiff *Harland*, by way of appeal from a decretal judgment pronounced by the Vice-Chancellor *Stuart* on the 15th of June 1855, whereby the Plaintiff's bill was dismissed with costs.

The bill in this suit was originally filed on the 1st of January 1849, by *Francis Morley*, since deceased, against *John Harland*, on behalf of themselves and all other unsatisfied creditors of *Josias Morley*, the testator, in the cause, against *John Readshaw Morley*, one of the surviving trustees and executors of his will, *Francis Morley*, the younger, the tenant in tail of such estates, and *Morley*, the widow of the testator, and others, intended to be bound under the will of the testator. The object of the bill was to have the same set aside, and to have the same decreed to be paid to the Plaintiff.

was to obtain a declaration that the late Plaintiff *Francis Morley*, who was tenant for life of certain real estate under the will of *Josias Morley*, in respect of various payments in satisfaction of certain bond debts made by him out of the rents of the estate, was entitled to stand in the place of the creditors of the testator, whose debts were so paid, as a creditor against the estate of the said testator, and to have the same raised and paid out of the said estates.

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The original bill stated the will and codicil of *Josias Morley*, the testator in the cause, whereby, among other things, he devised his residuary real estate upon trust, among other trusts, for payment of his debts. The bill also stated that the Plaintiff *Francis Morley* was tenant for life in possession of an estate called *Marrick*, and other estates specifically devised by the testator, of which the Defendant *Francis Morley* the younger was then the first tenant in tail in remainder; and that the testator was considerably indebted by specialty and simple contract, beside the debts due by him on mortgage. The bill then specified various bonds and promissory notes given by the testator and unsatisfied at his death, and stated that at the time of the death of the testator, the Plaintiff *Francis Morley* was only sixteen years of age, and that he did not enter into possession or receipt of the rents of the estate called *Marrick* till several years after the testator's death, but that the Defendant *John Readshaw Morley* and his co-trustee, since deceased, entered into such possession. The bill then stated that all the personal estate and effects of the testator, except the household goods and effects specifically bequeathed to the Plaintiff *Francis Morley*, and all other the property comprised in or which passed by the residuary devise and bequest in the will of the testator *Josias Morley*, were realised or converted into

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money



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money, and the proceeds applied in payment of his funeral and testamentary expenses, and some of his debts, other than mortgage debts due from him at the time of his death; and that in the year 1831, all the testator's real estate situate in the parishes of *Skipton* and *Addingham* were sold, and the monies arising therefrom applied in payment of mortgage debts and incumbrances charged on such real estates and other specialty debts of the testator; and that all the other real and personal estate and effects of the testator *Josias Morley* were sold, and realised or converted into money, except his manor, messuages, lands and hereditaments situate in the parish of *Marrick*, in the county of *York*, and called the *Marrick* estate, and devised in strict settlement by his will, and that no part of that estate had been sold.

The bill then stated that the debts of the testator *Josias Morley* which were so paid, did not comprise all the debts which were due from him at the time of his decease; and in particular that they did not comprise, amongst other debts, the several bond debts which were paid off by *Francis Morley*, the tenant for life, after he came into possession of the *Marrick* estate. The bill then stated that, by an indenture bearing date the 1st *July* 1848, all the personal estate, property, including the bond debts, credits and effects of what nature or kind soever, of or belonging or due and owing to him *Francis Morley*, together with all powers, remedies and means of him, both at law and in equity, for receiving, recovering and enforcing payment of the same, were granted, assigned and transferred by *Francis Morley* to the Plaintiff *John Harland*, his executors, administrators and assigns, upon trust (amongst other things) for the payment of the creditors of *Francis Morley* who should execute the indenture and subject thereto, with an ultimate

mate trust for the Plaintiff *Francis Morley*, his executors and administrators.

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On the 29th September 1849, *Mary Morley*, one of the daughters of the testator died, and the suit was revived against the Defendant *William Allen Francis Saunders*, as her representative. On the 3rd August 1854, the Plaintiff *F. Morley* died intestate, and letters of administration were granted to his widow.

A supplemental bill was filed on the 6th December 1854, by *John Harland*, stating these facts, and that the Defendant *Francis Morley* had become the tenant in tail in possession of the estate called *Marrick*, and praying the same relief as was prayed by the original bill.

The facts as to the payment of the several bond debts by *Francis Morley* were deposed to by him in an affidavit sworn in the original suit on the 9th June 1854, but that affidavit was not filed till the 28th February 1855, when it was filed in the revived and supplemental suit by the Plaintiff *John Harland*.

The Defendant *Jane Morley*, the widow of the testator, and *C. F. Saunders*, representing the interest of the children of the testator, alleged that the late Plaintiff *Francis Morley* was enabled by withholding payment of the jointure and the interest to the amount of 4,000*l.* on the sum of 9,000*l.*, bequeathed by the testator *Josias Morley* to his children, other than the late Plaintiff, to pay off the debts claimed by the bill, and that *pro tanto* they were respectively entitled to stand in the place of creditors whose debts were paid off by *Francis Morley*.

When the cause came on before the Vice-Chancellor *Stuart*, on the motion for a decree, his Honor was of opinion that the affidavit of the deceased Plaintiff *Francis Morley*,

1855. *Morley*, not having been filed till after his death, was held inadmissible, and dismissed the bill. The Plaintiff appealed to the Lord Chancellor.

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Upon hearing the facts his Lordship observed there did not appear to be any proof whatever of the debt before the Vice-Chancellor.

Mr. *Craig* and Mr. *J. H. Palmer*, for the Appellant, submitted, that though the Plaintiff proceeded with his case before the Vice-Chancellor, without the affidavit of *F. Morley*, yet he was only on the ground that strict proof of a debt was not required as the foundation for a bill in equity; *Owens v. Dickenson* (a), *Whitaker v. Whitaker*, *Gregson v. Booth* (c): that the present was a case of the motion for decree, and that it was competent for the Plaintiff to adduce further evidence, which had been received below, *Herring v. Cloberry* (d).

On its being proposed to read the affidavit, its admissibility was objected to by Mr. *Bacon* and Mr. *Palmer*, for some of the Respondents, on the grounds that the affidavit had been withdrawn before the Vice-Chancellor, notwithstanding the Plaintiff's intention to read it on the appeal ought not to be given; that there was no evidence of any intention on the part of *F. Morley* to use it, and that he could not now be cross-examined. They represented that on the last reason the Master of the Rolls had recently refused to receive an affidavit made by a person who had died immediately after filing it, had gone to Australia.


Mr. *Craig* and Mr. *J. H. Palmer*.

The affidavit of *F. Morley* ought not to have been received.

(a) *Cr. & P.* 48.  
(b) 2 *Hare*, 310.

(c) 5 *Hare*, 536.  
(d) *Cr. & P.* 251.

jected by the Vice-Chancellor. The proper course for the Defendants to have adopted was to have moved to have the affidavit taken off the file. The only ground upon which this evidence could be objected to is, that of the impossibility of cross-examining the deponent, but that is caused by his death, an event over which the surviving Plaintiff had no control, and for which he ought not to suffer, *O'Callaghan v. Murphy* (a). The notice of motion to withdraw replication, in terms informed the Defendants of the Plaintiff's intention to read the affidavit in question; besides the Plaintiff here has made an affidavit which incorporates that of the late Plaintiff *F. Morley*. And if neither is admissible, it is competent for the Court to examine witnesses now in support of the Plaintiff's allegation, *Martin v. Pycroft* (b).

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*The LORD CHANCELLOR.*

Under the peculiar circumstances of this case, I think it the safer course to allow the affidavit to be received. The question resolves itself simply into whether a delay of two months between the swearing and filing of the affidavit was so great as to exclude the present Plaintiff from filing it at all after the death of the deponent. Looking at the facts, it does not appear that any advantage could have been obtained from filing it earlier. I shall therefore permit it to be read; but there having been no opportunity for the cross-examination of the deponent, I shall have no scruple in giving less credit to the affidavit in question than to any evidence which may be adduced by the other side to rebut it.

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Another objection was raised by the Counsel for the Respondents, on the ground that *J. Readshaw Morley*, one of the executors of the testator, had not been made a Respondent

(a) 2 Sch. & Lef. 158.

(b) 2 De G. Mar. & G. 785.

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a Respondent to the appeal. They urged that, the ~~bill~~ having been dismissed as against him in the Court below ~~by~~, the present was a proceeding at best only to charge in ~~the~~ rests, which could not be affected until after it was es- ~~tablished~~ b-lished that the real estate devised for payment of de- ~~bts~~ and the personality of the testator were exhausted. ~~On~~ the other hand it was submitted by the Appellant, ~~that~~ the Defendant *J. R. Morley* had in fact exhausted ~~all~~ such real and personal estate in the payment of ~~the~~ testator's debts; and that, in truth, no relief could be ~~ob-~~ b-tained against him, even if he were served with a notice ~~of~~ of the appeal; that having been served in the Court ~~below~~, and not having appeared at the original hearing ~~it~~ it was not necessary on a re-hearing to serve him with ~~a~~ a fresh subpoena; that, at all events, the cause might be ~~per-~~ permitted to proceed, on the undertaking of the Plaintiff ~~to~~ to serve him with notice of the appeal, and that in the ~~mean~~ mean time judgment should not be given until he had been served.

*The LORD CHANCELLOR* allowed the argument to proceed, on the undertaking of the Appellant to serve *J. R. Morley* with a notice of the appeal, and on the understanding that judgment should not be given till he had been served.

*Mr. Craig and Mr. J. H. Palmer.*

The only question is, whether the Plaintiff, as representing the tenant for life, who has paid off incumbrances affecting the inheritance, has not a right to stand in the shoes of the creditors. In the absence of any evidence to the contrary, it is well established that a tenant for life discharging incumbrances, is presumed to keep them alive; *St. Paul v. Viscount Dudley* (a), *Barges v. Mawbey* (b), *Burrell v. The Earl of Egremont* (c). It is clear also that a bond and mortgage creditor

(a) 15 *Ves.* 167.

(b) *T. & R.* 167.

(c) 7 *Bees.* 205.

creditor has a charge upon the estate of his debtor in respect of the bond, and that neither the heir nor the devisee of the debtor can redeem the mortgage without payment of the bond debt; *Acton v. Acton* (a), *Challis v. Casborn* (b). In the Court below, some reliance was placed on the Statute of Limitations, but if the affidavit of *F. Morley* is receivable, it removes all doubt as to the Statute of Limitations, for during the existence of the tenancy for life the statute does not run, *Burrell v. The Earl of Egremont*.

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Mr. Bacon and Mr. Cairns, for *C. Morley*, the widow, and *Francis Morley*, the tenant in tail.

Bond debts are not charges on the real estate of a debtor within the benefit of the rule relied on by the Plaintiff; *Holley v. Weedon* (c); *Spackman v. Timbrell* (d). If they were, this consequence would follow, that every simple contract debt would be equally a charge. If the bond creditor has such a charge as is alleged, he can only have it under the Statute of Fraudulent Devises, 3 & 4 W. & M. c. 14. That statute merely refers to the case where the will of a testator stands between the creditors and their rights, and leaves the creditors unaffected by the devise; but until judgment was recovered, there was no charge upon the lands. In the case of *Spackman v. Timbrell* (d), Sir *L. Shadwell* lays it down that the statute does not charge the land but the person of the devisee. In the same way Lord *Langdale*, in the case of *Richardson v. Horton* (e), says, "debts by specialty in which the heirs are bound, constitute no lien or charge upon the land, either in the hands of the debtor or of his heir." [The Lord Chancellor referred to the observations of Lord *Cottenham* in *Pimm v. Insall* (f), in which the dicta of Sir *L. Shadwell* in the

(a) *Prec. in Ch.* 237.

(d) 8 *Sim.* 253.

(b) *Prec. in Ch.* 407.

(e) 7 *Beav.* 112.

(c) 1 *Vern.* 400.

(f) 1 *Mac. & G.* 449.

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the case of *Spackman v. Timbrell* (a), are questioned. The case of *Copis v. Middleton* (b) shows that where surety pays off a bond debt, the utmost right which can assert in respect of such payment, is to be a simple contract creditor. The case of *Burrell v. The Earl of Egremont* (c), is no authority for the Plaintiff, and the observations of Lord *Langdale*, which have been cited, were with reference to an express charge on the estate, and on which interest was payable de anno in annum, and there was an assignable person to pay, both which elements were wanting here. In the cases of *Jones v. Morgan* (d), and *Burges v. Mawbey* (e) also, the debts were expressly charged upon the estate. We further submit, that the whole of these bond debts being more than twenty years old, are barred by the Statute of Limitations. The bill contains no allegation of payment of interest; and even payment of interest by an executor will not keep the debt alive as against the inheritance; *Putnam v. Bates* (f); *Marten v. Whichelo* (g). It is also to be observed, that the deceased Plaintiff was himself, under the testator's will, entitled to one-half of the testator's residuary estate; and it is quite consistent with his affidavit that he paid the bond debts out of his share of the residue, which he was under an obligation to do before he took any of the residuary estate. It was said that service of notice of the appeal on the Defendant *J. R. Morley* would be sufficient, but it is manifest that it would be unavailing, for even if the Plaintiff was allowed to take the bill pro confesso against him, it must be only secundum allegata et probata. The whole fallacy of the Plaintiff's argument is in the assumption that he has a charge, whereas it is only what may be matured into a charge. Before the Statute of Fraudulent Devises (3 & 4 W. & M. c. 14), a creditor had

(a) 8 Sim. 253.

(b) T. & R. 224.

(c) 7 Beav. 205.

(d) 1 Bro. C. C. 206.

(e) T. & R. 167.

(f) 3 Russ. 188.

(g) Cr. & P. 257.

**had** no specific right against the heir of his debtor, but **only** in respect of assets descended, and up to that time **there** was no remedy against the devisee. That statute **placed** the devisee on the same footing as the heir (the **only** question being whether there was any devised land); **the** devisee, however, might have aliened, and the alienee **would** not have taken the estate cum onere.

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*Mr. Malins* and *Mr. Chapman*, for *Mr. and Mrs. Saunders* and the other parties claiming portions under **the** term of 500 years.

*Mr. Lindley* appeared for the trustees.

*Mr. Craig*, in reply.

*The LORD CHANCELLOR.*

This is one of those cases in which I entertain very little doubt. The original bill was filed on behalf of the tenant for life of an estate in *Yorkshire*, with remainder to **his** first and other sons in tail, and by the present plaintiff, **and** it sought to enforce a claim on the inheritance for the **amount** of certain bond debts which were created by the **devisor** of the estate, and which the tenant for life alleged **he** paid off from time to time after he came into possession of the estate; and the sole question is, whether such **payment** comes within the principle of this Court with **regard** to persons having partial interests in estates **paying** off incumbrances. The principle is, that where any **person** having such partial interest in the estate, pays a **debt** which is capable of being made a charge upon the **inheritance**, and at the same time takes every precaution **to show** that he has no intention of relieving the **inheritance** from its liability, the Court will aid him in **procuring** repayment out of the estate. When that is done **it is** usual to take an assignment, but very often that **precaution**, as a security, has been neglected and not had



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had recourse to; and then the question has arisen whether that was a mere oversight, whether the party intended to be in the position of a person paying off an incumbrance, and taking an assignment of it to himself, so that when his partial interest in the estate should cease, his right as incumbrancer might take effect, or whether it was intentionally done, in order to relieve the inheritance. The result of the long series of authorities, proceeding upon a very intelligible principle, I take to be this, that when an incumbrance is paid off by the person having a partial interest (that is, an interest less than the whole inheritance), unless there is something to show a contrary intention, the presumption is, that he meant to do that which in law and in equity he might have done, namely, to keep it alive for his own interest, and that the omission was a mere oversight; in such a case the Court will supply that omission, by giving him or by causing the proper parties to give him, if necessary, an assignment or an instrument which shall put him in the same position as if he had obtained it for himself. The presumption is different where the party paying off the incumbrance is entitled to the inheritance,—where he is absolutely entitled to the fee simple.

Now here, Mr. *Francis Morley* was tenant for life, and what he did was not to pay off anything which, properly speaking, was an incumbrance on the estate, but he paid off a great number of bond debts which were created by the testator in his lifetime; and the question is, whether by discharging those bond debts he was in the same predicament as if he had paid off an incumbrance or charge upon the estate. In the course of the argument there have been incidental discussions, which I by no means regret, for they have been important to clear up some inaccuracies which have arisen from this being more the subject of ancient law than what is commonly resorted

to now, as to the nature of the rights of bond creditors upon the estates of the heirs or devisees of their bond debtors. I take the principle of the law to be this, the right against land on the part of creditors, even by judgment, was only a right created by statute though a very early one (13 *Edw.* 1, c. 18, *Westminster* the Second), one of those statutes which we are accustomed to look at as common rather than statute law, although they are statute law. With respect, however, to the right of a creditor by specialty when the heirs were bound against the lands of his debtor, which descended to the heir, my impression is, that by common law such lands were assets for the payment of the ancestor's debts. But in whatever way these rights originated, they are different in the one case from what they are in the other. In the former, the statute of *Westminster* the Second, (13 *Edw.* 1, c. 18,) gives the right to a judgment creditor by writ of *elegit* to have a writ directed to the sheriff, to put him in possession of half of the lands belonging to his debtor; but the right that a bond creditor, when he sues the heir, has against the lands of the giver of the bond, is a right by common law, and is a right to treat the heir as being his debtor and to recover judgment against him on the debt, but limited in this way, that he is to take his execution from the lands that have descended upon the heir from the ancestor, and according to the form that is expressly stated in the judgment, whereupon the writ of extent issues to the sheriff, commanding him to inquire of what lands the judgment debtor, the ancestor, died seised at the time the writ was sued out, and what descended to his heir, and those lands he was desired to extend and take in satisfaction of the debt. Such being the nature of the legal rights of bond creditors, what is the course that this Court takes in respect of such debts? This Court does not give or affect to give to such creditors equitable rights as to the land any more than it would

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would to simple contract creditors, or to bond creditors in respect of the personal assets; and although equitable rights are enforced in this Court, it is merely that the Court makes itself ancillary to giving a more convenient redress, because it is intended to be practically the same as that which all the creditors would have got at law, if they had all sued concurrently. This Court abhors creditors running to try who shall get the first judgment, and therefore gives to all equally: as for instance in the case of a creditor's suit against executors; and in suits by bond creditors, in order to be paid out of the real estate which descended upon the heir, it directs the property to be sold instead of being extended, and out of the proceeds payment to be made to the creditors. Where, however, there is an estate of the value of 100,000*l.* and debts proved to the amount of 10,000*l.* only, the Court would never by its decree order a sale of the whole of the estate, nor would it leave creditors to be paid by taking possession of the land, nor impose upon the heir the burden of satisfying the debts out of the annual rents, but it would direct a sale of a competent part of the estate in order to meet the debts.

Now here the estate is not in the hands of the heir, but in the hands of the devisee, although practically since the Statute of Fraudulent Devises, (3 & 4 W. & M. c. 14,) that makes no difference. Before that statute we know that a devise defeated the right of a creditor altogether, because the judgment was that it should be recovered out of the real estates which had descended to the heir, and the inquiry was what lands descended on the heir and remained in the heir up to the time of the suing out of the writ. The answer would have been *nil* as to all the lands which had been devised away. This was a very improper mode of defeating the rights of creditors, and to obviate that the Statute of Fraudulent Devises

was passed, which substantially made devised lands liable just in the same way as if they had been left to descend; the statute says that the devise shall be fraudulent and void as against creditors, and proceeds to enact, that, notwithstanding such devise, the creditors may sue the heir, joining with him, as a Co-defendant, the devisee of the obligor of the bond. An expression dropped from one of the counsel during the argument which I forgot to notice at the time, but which struck me as inaccurate, to the effect that the statute enables you to sue the devisee, making the heir a Co-defendant. I take it to be more accurate to say, that it enables you, as you had the right before to continue to sue the heir, making the devisee a Co-defendant. What the statute says is, that the devise shall be utterly void, frustrate and of no effect, as against creditors. You must continue to sue the heir as before, but as some one else has got the property you may sue him also as a Co-defendant. However, that is not very important, although I think it right to notice it.

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Having considered the matter thus far, the way is cleared to see what are the rights at law and in equity of bond creditors, in respect of their bonds, against the estates which have descended or been devised. They may file a bill in this Court on behalf of themselves and others, to have that, which is a purely legal right, made available to them against what are purely legal assets, just as they might have proceeded at law; except that in such a case this Court, delighting in equality, gives it all rateably instead of letting the creditors take according to the priority of their actions at law. The equity asserted by this bill is, that a person having an estate for life in *Yorkshire*, and having paid off certain bond debts of his ancestor, is entitled to the same rights as if there had been incumbrances on the estate to the amount of those bonds. The argument, that there is no substantial difference

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ference between the one case and the other, seems : the first blush very plausible. It may be that they are distinctions which, if we were now going to legislate, by making a law *de novo*, we might say ought not to exist and that the same law should be applicable to the one as to the other; but that is not the question, for we must administer the law as we find it. I think, however, there are very great distinctions. When I pay off an incumbrance I in fact make myself a purchaser of a portion of the inheritance. The incumbrance, whether it be ascertained previously by deed or otherwise, or whether it be merely created by will in the shape of a charge of a particular sum of money, or of a debt, or of a general charge of debts, after the amount has been ascertained, is in truth an appropriation of a particular part of the inheritance for a particular object. When I pay off that, therefore, it is quite certain that I become entitled to that portion of the inheritance, whether it be a debt or other charge. It may not at the moment I pay it off be ascertained what is the exact amount, but it is capable of being ascertained—certum est quod certum reddi potest. But when I pay off one of twenty bond debts, what part of the estate does that give me? None at all, if other bond creditors sue immediately at law and obtain a judgment. Supposing I take every precaution to get the debt assigned, it still only puts me in the same situation as any other of the bond creditors would have been, and I might be defeated entirely by others getting prior rights before me. But moreover there is this practical distinction: I cannot keep up my legal right after I have paid off the bond: I cannot pay off a bond and then say afterwards nevertheless I will sue, because in equity I have a right to it. I do not mean to say that this cannot be done by the contrivance of an assignment nominally to some third party, but in trust for the person paying off the bond, and which would

would be valid in equity, but even that would not give the person paying off the bond a right to become an incumbrancer on the estate, though this Court would compel the creditor to allow the use of his name in any proceeding which it might be thought fit to institute; but this consequence would follow, namely, that what would be a defence to the creditor would also be a defence to the party using his name. You cannot by taking the assignment of a bond debt put the debtor in any worse predicament than he would have been in if it had not been assigned. In short, you can only sue in the name of the person from whom you take the assignment of the debt. Then what is the result of these principles in the present case? Here the owner of the inheritance at all events sets up the Statute of Limitations, the other Defendants do not in terms set up that Statute; but I am at a loss to conceive how the Statute can be a bar to charging the inheritance without also being a bar to charging everything affecting the inheritance. It is quite certain that in the year 1849, when the suit was originally instituted at the instance of Mr. *Morley* desiring to stand in the shoes of bond creditors, there would have been an answer on the part of those who pleaded the Statute of Limitations. It is said that all the Defendants did not plead the Statute. Take that to be so, I do not know how that may be, but I doubt whether when the owner of an inheritance pleads the Statute of Limitations it must not be taken as pleaded for all.

But I do not think it is necessary to speculate upon that point for this reason:—This suit relates to bond debts, and quite independent of the Statute of Limitations: for the quieting of the possession of mankind long before any Statute of Limitations passed affecting specialty debts, it was a rule and presumption of Law, for the benefit of mankind, that, after twenty years, bonds must be pre-

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sumed to have been satisfied. Now is that a reasonable presumption or not? I think it is a presumption that is conclusively established to be true in this case; *prima facie* certainly, for the most obvious of all reasons, namely, that the bonds, or most of them, are cancelled, and delivered up into the hands of the obligor: but the suggestion that has been made is, that they were paid off under the notion, that, although there was no assignment taken, yet that the person paying them off, being the tenant for life of the estate who would eventually not be the person to be made liable, paid them off only to keep them alive. I doubt whether any such intention as that could be inquired into, certainly not as against the inheritance, and certainly not against those who pleaded the Statute of Limitations.

But that brings me to consider the question of intention. True it is, that in the case of an incumbrance paid off by a tenant for life, or other person having a partial interest, the absence of an assignment to keep it alive does not conclude him. If the result of the opinion of the Court is, that he intended to pay it off for his own benefit, that will keep it alive; but it is necessary to show that he did at the time intend to keep it alive, for I take it to be clear that if a tenant for life pays off an incumbrance, intending to discharge the inheritance, he cannot afterwards say, "I have altered my mind, and will now revive it." The question is, what is the presumption here as to what was the intention—looking at it in the most liberal point of view—of Mr. *Francis Morley* when he discharged these bonds? I think the presumption which I must arrive at is, that he intended to pay them altogether. Nothing could be so probable. He was tenant for life. He was a young man in his minority when he succeeded to the property, and I observe that he paid them all off when quite a young unmarried man, when

estate was his for life, with remainder to his first and other sons. I dare say he considered it as if it were an entailed estate. He married I believe in 1836 or 1837; almost all the bonds were paid off before the marriage, but some were paid off afterwards. I cannot believe that if he had intended to keep them alive he would have torn the seals off the bonds; he would have kept them to show that he had a charge as a bond creditor *valeat quantum*. In his affidavit he says that he borrowed money to pay them off, and that he had afterwards paid off the money so borrowed, but with the view, I have not the least doubt, of discharging the estate from them, and I infer that from the language of his own affidavit. I had at first some doubts whether that affidavit ought to have been read, but I think that I was right in admitting it, and I am very glad that I so decided. I observe that in almost all the cases his own words are, "I paid off the bond:" sometimes the expression is, "I paid the bond;" but I think in the majority of the cases, at any rate in a great number of them, the expression is, "I paid off the bond;" the result is conclusive, that he meant there was an end of the bond; and I observe he does not say one word about his having any intention when he so paid them off. I may here remark, that although I admitted the affidavit in evidence, yet, I think, it is evidence which ought to be received with the greatest caution, for the parties were precluded from the opportunity of cross-examination, and I ought to presume that upon cross-examination every thing which the circumstances of the case suggest as probable against the party making the affidavit ought to be taken as evidence against him. Suppose he had been cross-examined, and this question had been asked, "Did you, at the time you paid off these several bonds, intend to keep them alive as against the inheritance, or to get rid of them for ever?" His answer would have been, "I meant to put an end to them." That would have

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been his answer, if he had answered as an honest man, which I have no reason to suppose he was not.

Therefore, in my opinion, the principle of law which is clearly settled with regard to the discharge of an incumbrance by a tenant for life, does not apply, or only in a very remote degree applies, to the discharge of a bond debt. I do not say that a tenant for life discharging a bond debt, and taking care at the time to manifest the intention not to pay it off altogether, but to keep it alive, cannot preserve to himself the rights of the creditor. The strong presumption, however, is, that he has no such intention; but even if he has such an intention it is an intention which he cannot make available, if he has allowed such a lapse of time to pass as that the bond creditor, if suing for himself, would have no right against the estate. That does not apply where the debts are charged, because, whether charged in the lifetime or by the will, the same result happens, that each debt, when ascertained, becomes a charge upon the inheritance; whether they are charges in order one after another or to be rated *pari passu*, when they are ascertained, they are still charges, and the principle applicable to them, to be derived from the decided cases, is not a principle which can govern a case like the present.

My opinion, therefore, is, that the judgment of the Vice-Chancellor was quite correct, and that this appeal must be dismissed with costs.

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WALTERS v. The NORTHERN COAL MINING COMPANY.

March 10, 14,  
17, 28, 31.  
April 18, 21.  
November 26.

THIS was an appeal by the Plaintiff from the decree of the Vice-Chancellor *Wood* made upon the hearing of the cause, whereby the Plaintiff's bill was dismissed, but without costs. The facts of the case are fully stated, and the arguments on both sides reviewed, by the Lord Chancellor in his judgment.

Before The  
Lord Chan-  
cellor LORD  
CRANWORTH.

Mr. *Rolt* and Mr. *T. Stevens* appeared for the Plaintiff in support of the appeal, and relied upon the authority of the case of *Clavering v. Westley (a)*, which was not cited before the Vice-Chancellor.

In pursuance of an arrangement made on behalf of a Joint Stock Company with certain persons to purchase the beneficial interest in a colliery lease agreed to be granted to them for a term of forty years, a lease was granted in March 1842 to three per-


Mr. *Malins* and Mr. *Roxburgh* appeared for the

Defendant,

(a) 3 P. W. 402.

sons, as trustees for the Company, for a period of forty years, at a fixed rent, together with a royalty. The lease contained a stipulation enabling the lessees, at the end of any period of three years from its commencement, to determine the lease by giving twelve months' notice. The Company entered into possession in December 1841, and remained in such possession till November 1842, when the working proving unprofitable was abandoned and never afterwards resumed. In January 1850 the Company was dissolved, and its affairs ordered to be wound up under the provisions of the Joint Stock Companies Winding-up Acts. The lessor became bankrupt in August 1853. Some time prior to his bankruptcy his interest in the mine became vested in the Plaintiff. In May 1852 the Official Manager of the Company, under protest that the lease was not binding on the Company, gave notice to terminate the lease on the 31st of May following, when one of the triennial periods expired. On the 23rd February 1853 the Plaintiff filed his bill against the Official Manager of the Company, praying a declaration that the Company had accepted the lease and were bound thereby, and that the Official Manager might be ordered to pay the arrears of the stipulated rent since March 1842, together with compensation for all breaches of covenant:—*Held*, that no relief in the nature of specific performance, nor any equitable relief, could be granted either against the persons to whom the demise was made or against the Company in respect of their occupation, the rights of the Plaintiff, if any, being legal.

The case of *Clavering v. Westley*, 3 P. W. 402, so far as it might be an authority for the recovery of rent as an equitable debt, disapproved.

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Defendant, the Official Manager of The *Northern Coal Mining Company*, who was the Respondent, and argued that the bill ought to have been dismissed with costs.

Mr. *Smythe* and Mr. *Baggally*, for other parties.

Mr. *Rolt*, in reply.

The following authorities were cited and commented upon during the argument, *Bull v. Sibbs* (a), *Nesbitt v. Meyer* (b), *Mundy v. Jolliffe* (c), *Wood v. Midgley* (d), *Milward v. Earl Thanet* (e), *Stewart v. Smith* (f), *Clarke v. Moore* (g), *Southcomb v. The Bishop of Exeter* (h), *Watson v. Reid* (i), *Eads v. Williams* (k).

Nov. 26.

The LORD CHANCELLOR.

The bill in this case was filed by the Plaintiff as the owner of certain colliery royalties in the county of *Durham*, against the Official Manager of The *Northern Coal Mining Company*, seeking to obtain payment of large arrears of rent, and also compensation for various breaches of covenant.

The case made by the Plaintiff is as follows:—In the year 1838 a Joint Stock Company was formed, called “The *Northern Coal Mining Company*,” the deed of settlement regulating its affairs bearing date the 1st *June* 1838.


That

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|------------------------------------------------|-------------------------------------------|
| (a) 8 <i>T. R.</i> 327.                        | (c) 5 <i>Ves.</i> 720, in <i>notis.</i>   |
| (b) 1 <i>Swanst.</i> 223.                      | (f) 6 <i>Hare</i> , 222, in <i>notis.</i> |
| (c) 5 <i>Myl. &amp; Cr.</i> 167.               | (g) 1 <i>J. &amp; L.</i> 723.             |
| (d) 2 <i>Sm. &amp; Gif.</i> 115 ; <i>S. C.</i> | (h) 6 <i>Hare</i> , 213.                  |
| on appeal, 23 <i>Law J. (Chanc.)</i>           | (i) 1 <i>Russ. &amp; M.</i> 236.          |
| 553.                                           | (k) 4 <i>De G. Mac. &amp; G.</i> 674.     |

That deed, after reciting that the parties by whom it was executed had agreed to form themselves into a Joint Stock Company for the purchase and working of coal mines, and that several collieries had been then already purchased or taken for and on behalf of the Company, including, amongst others mentioned by name, certain collieries and coal royalties at *Whitelee* and *Old Roddymoor*, in the parish of *Brancepeth*, in the county of *Durham*, witnessed that the several persons, parties to the deed, should constitute a trading Company, to be called "*The Northern Coal Mining Company*," to endure for forty years; that its objects should be the working of the collieries and coal royalties then already purchased or taken, or contracted to be purchased or taken, the selling the produce thereof, and the working and selling the produce of collieries to be thereafter purchased or taken. Provisions were then made as to the capital of the Company and the management of its affairs by a *London Board of Directors* and a *country Board of Directors*, and for the calling of general meetings of the proprietors, and for various other purposes.

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The present suit relates to the *Whitelee* and *Old Roddymoor* collieries exclusively. The interest of the Company in those collieries was derived originally under an agreement, dated the 5th August 1837, made between *George Allison* and *Thomas Brown*, of the one part, and *George Faith* and *Hunter Gordon*, described as two of the provisional committee of *The Northern Coal Mining Company*, of the other part, whereby *Allison* and *Brown*, as lessees of the collieries in question, agreed to sell their interest therein to *Faith* and *Gordon* in consideration of a sum of 45,000*l.*, to be paid as therein mentioned. After the formation of the Company, a lease was executed by *John Charles Ord*, dated the 21st March 1839, whereby he demised those collieries to *Hugh Panton*, the said  
George

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*George Faith and John Botcherly*, for a term of forty-two years from the 1st *June* 1838, at a certain fixed minimum yearly rent of 850*l.*, besides an additional rent for all coal which should be raised beyond the quantity mentioned in the lease. This demise was made in pursuance of the agreement of *August* 1837, and by the direction of *Allison and Brown*, who had been described in the agreement of *August* 1837 as lessees. *Ord* was owner of the fee, and no actual lease had ever been made by him to *Brown and Allison*, and therefore, to avoid multiplicity of deeds, he demised at once to the Company, or rather to *Panton, Faith and Botcherly*, as trustees for them. It appeared, however, that as to a large portion of the collieries, *Ord* was, at the time of the demise in *March* 1839, merely an equitable owner. He had agreed to purchase it from a gentleman named *Spackman*, but the legal fee was not conveyed to him until *September* 1839, and afterwards, on the 12th *March* 1841, he executed a fresh lease to *Panton, Gordon and Botcherly* for the residue of the forty-two years term, in order, as is alleged by the bill, to clothe them with the legal interest as trustees for the Company. This object certainly was not attained, for in the month of *March* 1840, a year before the second demise, and after the legal estate had been conveyed to *Ord*, he married *Elizabeth Ann Surtees*, and, in contemplation of that marriage, indentures of lease and release were executed, dated the 23rd and 24th *March* 1840, whereby *Ord* conveyed the fee of all the mines comprised in the indenture of lease to trustees therein named, and their heirs, to the use of them for a term of 100 years, on certain trusts for his intended wife and the children of the marriage, and subject thereto to the use of *Ord* and his heirs. The term of 100 years had, therefore, clearly precedence over any term which *Ord* could create by the subsequent deed of the 12th *March* 1841. It had been part of the terms of the original agreement

ment of the 5th *August* 1837, that *Brown* and *Allison* should at their own expense win and open out the colliery, with all necessary pits, engines and machines, and erect cottages for the workmen. Until this had been done, it was of course impossible to work the mine. It was, in fact, put into a condition for working previously to the month of *July* 1841, but, before the Company had commenced working it, possession of it was taken by the *Newcastle Banking Company*, claiming under a mortgage from *Ord* prior to the title of the Company.

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Before this was done, the shareholders in the Coal Mining Company had become dissatisfied with the conduct of their directors, or of some of them, on the ground, among other causes of complaint, that they had from the first sacrificed the interests of the Company to those of the persons from whom the mines were purchased, many of the Directors having been themselves originally owners or lessees of collieries, which they sold to the Company. In *May* 1841, a committee of shareholders was appointed to inquire into these subjects, and several of the Directors were removed or retired from their office; and, on the 31st *July* 1841, a bill was filed by *Charles Evans* and others, on behalf of themselves and the other shareholders against the Directors so retiring and others: one object of which was to set aside the lease of the *Whitelee* and *Old Rodilymoor* collieries, and to charge the retiring Directors, or some of them, with the sums paid out of the funds of the Company for its purchase. The bill alleged, that as to a large portion of the mines demised by the leases of 1839 and 1841, *Ord* had, in fact, no title whatever, and that the quantity of coal royalty which would be to be worked by the Company would be materially less than had been originally agreed.

Before any proceedings were taken in that suit, an agreement


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agreement was come to for terminating all differences between the parties. That agreement bears date the 9th *October* 1841, and is thus described, "Heads of an agreement for a final settlement of all matters in difference between the *Northern Coal Mining Company* and Messrs. *Brown, Botcherley, Ord, Allison, Faith* and *Panton*, ex-directors, and other vendors, if any, of collieries and properties to the said Company."

The substance of the arrangement was, that certain specified debts of the Company should be liquidated, partly by Messrs. *Ord, Brown* and others, in exoneration of the Company; that a material reduction should be made in the rent reserved by the lease of *Whitelee* and *Old Roddymoor*, i.e. in the rent payable beyond the fixed rent of 850*l.*; that in the future workings of those collieries, the Company should have credit for the sums already paid, by way of rent, to *Ord*; that the quantity of coal royalty originally stipulated for by the Company should be substantially made up; that the leases not then completed should, within two months, be perfected by the signatures of all necessary parties; that the *Newcastle Bank* should give up to the Company possession of the *Whitelee* colliery, and should place to their credit the balance of the proceeds accrued during the period of their working it; and that all proceedings at Law and in Equity should cease, each party paying his own costs. This agreement was signed by *Brown, Botcherly, Ord, Allison, Faith* and *Panton*, the persons of whose conduct the Company had chiefly complained, and by *Samuel Dalton* on behalf of the Company, for whom he had, or assumed to have, authority to act.

On the 2nd *December* following the date of the agreement, that is the 2nd *December* 1841, the Company took possession of and began to work the colliery which the


**the** *Newcastle Bank* had up to that date been working, **it** having been one term of the agreement of the 9th *October* 1841, that the stipulated amount of coal royalty **should** be made up. *Mr. Clayton*, a solicitor at *Newcastle*, having or assuming to have authority from the **Company**, caused to be prepared a lease from *Ord* to the **persons** named in the former leases as trustees for the **Company**, of about 171 acres of coal mine, in addition to **that** comprised in the former leases, and, after some **difficulty** on the part of *Ord*, he prevailed on him to **execute** it. It bears date the 4th *March* 1842, and was **executed** by him on that day. The **Company** were then **working** the mine. The pit had been sunk on part of **the** land of *Mr. Ord* comprised in the former leases, his **title** to which was not disputed. There is a question on **the** point, whether the **Company**, in fact, extended their **working** into any part of the mine newly demised by the **lease** of the 4th *March* 1842.

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The **Company** worked the colliery from the time when **they** first had possession, namely in *December* 1841, till *November* 1842, when the working proved to be unprofitable and costly, and they therefore abandoned it, taking **care**, however, to keep the colliery free from water and in **working** order.

The working was never afterwards resumed, and, by **an** order of this Court, made in the matter of the Joint Stock Companies Winding-up Acts and dated the 12th *January* 1850, it was ordered that the **Company** should **be** dissolved and its affairs wound up under the provisions of those Acts. *William Quilter* was afterwards duly appointed Official Manager. *Mr. Ord*, the original lessor, fell into great embarrassments, and, having deeply incumbered his interest in the mines, he became bankrupt in *August* 1843. It is unnecessary to trace in detail the  
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progress and devolution of his title. It is sufficient say that all his interest, as well in the mines themselves as also in all arrears of rent (if any), eventually became vested in the Plaintiff except as to a small portion of property which was purchased by the Defendant *Jose Pease*. It was one of the terms of all the leases that lessees might at the end of any period of three years from the 1st *June* 1838 determine them altogether by giving twelve calendar months' notice of their intention so to do. On the 31st *May* 1853, the fifth period of three years expired, and above one year previously to that date, namely, on the 29th *May* 1852, *Quilter*, the Official Manager, gave notice to the Plaintiff and *Pease* that put an end to the lease at the end of the then current period of three years. This notice was, however, coupled with a protest against the validity of the leases, which did not admit to be in force or binding on the Company or on him as the Official Manager.

The present bill was filed by the Plaintiff on the 22nd *February* 1853, claiming all the rights originally vested in *Ord* except so far as relates to the part of the property purchased by *Pease*, and its object is to obtain payment of the rent of 850*l.* which has been in arrears almost from the commencement of the demise, and also to obtain compensation for breaches of covenant. The prayer is as follows:—"That it may be declared that the *Northern Coal Mining Company* accepted the lease of the 4th *March* 1842 and are bound thereby to be liable for the payments of the rents thereby reserved and to the observance and performance of the covenants and agreement therein contained and on the part of the lessees therein named to be observed and performed that an account may be taken of the arrears remaining due from the *Northern Coal Mining Company* in respect of the fixed or certain yearly rent of 850*l.* with interest thereon

thereon, and also (if it shall appear that any such accrued due) in respect of the tentale or royalty rents reserved by the several indentures of lease, and that the same may be apportioned between the Plaintiff and the Defendant *Joseph Pease*; and that the said Defendant, the Official Manager of the Company, may be decreed to pay to the Plaintiff what shall be so apportioned to or for him; that an account may also be taken of the arrears of rent remaining due from the Company for or in respect of damaged ground under the several indentures of lease or any or either of them, and that the amount so found due may be paid by the Official Manager to the Plaintiff; that the Defendant, the Official Manager, may be decreed to pay to the Plaintiff a fair compensation, to be ascertained if necessary under the direction of this honourable Court, for all breaches of covenant contained in the several indentures of lease on the part of the lessees which at the determination of the leases or any or either of them, under or by virtue of the notice of the 29th May 1852, shall remain to be performed on the part of the Company; that the Defendant, the Official Manager, may pay to the Plaintiff his costs of the suit, together with his costs of the proceedings before the Master charged with the winding up of the Company.


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The Defendants having duly put in their answers the cause was at issue, and there was a great deal of evidence on both sides both oral and documentary.

The cause was heard before Vice-Chancellor *Wood* in the latter part of last year, when his Honor dismissed the bill.

I collect from his Honor's judgment, of which I was furnished with a full note, that the case was argued before him,

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him, or at all events that he considered it to have been argued as a case in which the question was, whether the Plaintiff was entitled to relief by way of specific performance of the agreement for a lease contained in the document of the 9th *October* 1841, *i. e.*, whether the Plaintiff was entitled to call on the Company to bind themselves by covenant to pay the rent reserved and perform the covenants contained in the leases. His Honor was of opinion that the Plaintiff had made no case for any such relief; for though he thought that the Company had adopted and accepted the new lease of the 4th *March* 1842, yet as they had not, in fact, derived any benefit from the lease, and as no steps were taken by *Ord* or those deriving title under him until just before the expiration of the term, so that it would be impossible for the Plaintiff to obtain a decree until after the term was at an end, his Honor was of opinion, on principle and on authority, that no relief in the nature of specific performance could be granted. His Honor referred to the case of *Nesbett v. Meyer* (a), before Sir *Thomas Plumer*. In that case the Defendant had taken possession of a house and land at *Norwood* under an agreement for a lease for a term of three years with an option to hold on for two years more. The term expired before the cause could be brought to a hearing, and Sir *Thomas Plumer* on that ground refused the relief sought, at the same time saying he did not mean to determine the general question that in no case the Court would decree execution of a lease after expiration of the term.

I entirely concur in the observations made by Vice-Chancellor *Wood* on this subject. Perhaps Sir *Thomas Plumer* was right in declining to say that there might not be a case in which it might be fitting for the Court to de-

cre-

(a) 1 *Swanst.* 223.

**cre**e the specific performance of a contract for a lease after the term had expired. But certainly the circumstances of the case must be very special indeed to warrant such an interposition of this Court. What the Court really would be decreeing in such case would not be the specific performance of an agreement for a lease, but merely that the lessee should make himself a specialty debtor in respect of past benefits received. No lease properly so called could be made after the expiration of the time.

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The demise, which was the very object of the contract, could not be made, or if made in words would in substance be a mere fiction. Although, therefore, I desire to use the same caution as was adopted by Sir *Thomas Plumer*, yet I have no hesitation in saying that the case must be very special indeed which should induce the Court to decree specific performance of an agreement for a lease after the stipulated term has expired.

The Plaintiff, being dissatisfied with the decision of the Vice-Chancellor, brought the cause by way of appeal before me, and it was argued very fully for several days. The Plaintiff contended that his argument had been misunderstood in the Court below; that what he seeks by his bill is not the specific performance of an agreement for a lease, but the recovery of the rent as an equitable debt due from the Company in respect of their past occupation. The lease of the 4th *March* 1842 was, he contends, accepted by the Company, and that they are therefore liable in equity to perform its obligations by paying the reserved rent and performing the covenants. The relief sought rests on two propositions, one of fact the other of law. The proposition of fact is, that the lease of the 4th *March* 1842 was a due compliance with or at all events was accepted by the Company as a due compliance with that part of the agreement of the

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the 9th October 1841, whereby it was agreed that the quantity of coal royalties stipulated for should be substantially made up. The proposition of law is, that the lease having been thus accepted, the Company being the parties really interested as lessees, *i.e.*, being the *cestuis que trust* of the persons to whom the demise is in terms made, and having acted as lessees, are liable in equity to the payment of rent as an equitable debt due to the lessor. But what principle is there to warrant such a proposition of law? The rights of a landlord against those who occupy his land are legal rights, well defined and understood. Where a tenant is holding under a demise at a stipulated rent the landlord has his remedy by distress or by action of debt, and in most cases the demise contains a covenant, by the tenant for payment of rent, on which therefore the lessor may sue if the rent is not paid, and so the covenant is broken. If the lessee assigns to another the landlord has against the assignee, so long as he remains in possession, the same rights which he had against the original tenant. If, instead of assigning his interest, the lessee creates a tenancy under himself, the original landlord may either distrain on the under-tenant or may bring his action of debt or covenant as the case may be against the original lessee.

Where no legal tenancy has been created, but land has been occupied by a third person with the consent of the owner, then in general the owner may maintain an action against the occupier for the use and occupation of the land on an implied assumpsit by such occupier to pay a reasonable compensation for his occupation; and now by statute this remedy may be resorted to even where there has been an actual demise, but not a demise under seal.

Where possession of land has been wrongfully had without

**without the consent of the owner, there is a remedy by an action of trespass for the wrongful occupation.**

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**These are legal remedies well adapted to enable the owner of land in all circumstances to obtain his rent, or if there is no demise then a reasonable compensation for the use of his land. The object of the present bill is to give to the landlord an additional remedy in case the legal lessee is a mere trustee for others who have, in fact, occupied the land, to enable the landlord in such a case to treat the cestuis que trust as equitable debtors for the amount of the rent. But I can discover no principle to warrant such a proposition. The relation between the owner of land and those who occupy it is of a purely legal character. The circumstance that there is a relation of an equitable character subsisting between the lessee and the actual occupier cannot give any equitable rights to one who claims by a title paramount both to the trustee and the cestuis que trust. Whatever be the relation between the lessee and the occupier the landlord's rights are unaffected. He has his legal remedy by distress, or he may bring his action against the lessee. If the cestuis que trust should, as they certainly might, call on the lessee to assign the legal interest to them, the landlord would have a legal remedy by action against them as assignees. It surely could not be contended that in such a case the landlord could sue in equity as well as at law, and yet if before the assignment he had an equitable right against the occupier, how could the occupier destroy that equitable right by an act to which the landlord was no party? It can make no difference in principle that the lease is not executed by the persons to whom the demise is made, except that in such a case the landlord may not be able to maintain an action of covenant.**

**But if the persons to whom the demise is made accept**  
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the lease, either by occupying the demised property themselves, or by permitting others to do so, as their nominees, the non-execution of the instrument of demise will not prevent the lessor from recovering his rent, either by distress or by action of debt against the lessee.

Where indeed the demise is made to persons who have neither executed the lease nor adopted it by entry or otherwise, they are of course mere strangers. Against them the landlord can have no right; if on such a demise other persons enter, claiming to be cestuis que trust of the nominal lessees, the landlord's remedy may be by distress. If the parties in possession have so conducted themselves as to be precluded from disputing against the landlord the validity of the lease as a good demise to the persons named as lessees, or if they have not so bound themselves, and the lessees disclaim the lease, then the landlord would have a remedy by action for use and occupation.

If there was a previous contract between the cestuis que trust and the landlord that he should grant, and that they or their trustees should accept, the lease, the landlord would be entitled to a specific performance of that contract, and the persons with whom he had contracted would, on an application to this Court, made in due time, be compelled, either by themselves or their trustees, to execute the counterpart of a proper lease. Taking then these principles as our guide, they will, I think, enable us to come to a satisfactory decision on the case now before us. The bill is framed on the assumption that the Company assented to and adopted the lease of the 4th March 1842, as having been made to their nominees and in trust for them, and as a full performance of that term in the agreement of the 9th October 1841,

41, whereby it was stipulated that the quantity of coal  
rality should be substantially made up.


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In order to show that the Company did in fact adopt  
I were bound by the lease, the Plaintiff relies on  
great many circumstances. First, he contends that  
ayton, who prepared the lease, had previous autho-  
y from the Company to enter on their behalf into  
arrangements embodied in that lease, and so that  
subsequent ratification by the Company was ne-  
ssary; and secondly, even if the previous authority  
Clayton be doubtful, still the Plaintiff contends  
at the fact of the execution of the lease, with all its  
rticulars, was immediately after its execution com-  
municated to the Company, and that they recognized  
d sanctioned what had been done by Clayton, and  
opted the new lease as duly made in fulfilment of the  
reement. The Plaintiff contends that this adoption  
proved by express resolutions of the Company, or if  
at is not a fair construction of their proceedings, then  
contends it is proved by the fact that the Company,  
ter they were aware of the lease, continued to work  
e colliery, and even extended their works (this however  
disputed by the Company) into the newly acquired  
ine. The Plaintiff further relies on the conduct of the  
ompany after the workings had ceased, they having on  
ore than one occasion endeavoured by treaty with third  
rsons to sell to them their interest in the whole of the  
ne, including their title to that which depended solely  
the lease of the 4th March 1842. On this point, that  
the adoption or non-adoption by the Company of the  
w lease, there is a great deal of conflicting evidence,  
at all events of conflicting inferences from the facts in  
oof. The Vice-Chancellor was of opinion that the  
ompany had by its conduct become bound by the lease.  
incline strongly to the same opinion, though if I  
U U 2 thought



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thought this essential to the decision of the case I should have desired further to consider the point; for the contention on the part of the Company, that *Clayton* had no authority to bind them; that they never agreed to accept anything less than a full equivalent for the deficient royalty, and that the new lease did not give such an equivalent; that there were no workings made, or at least events intentionally made, beyond the mine included in the former leases, and that the treaties for sale were mere treaties to sell the interest of the Company, whatever that interest might turn out to be, is certainly entitled to great consideration.

I do not however think it material to go into any inquiry on this point, for, even assuming the fact to be as is contended for by the Plaintiff, that the lease was accepted by the Company, still I do not think that such acceptance entitles him, or would have entitled Mr. *Ord*, if he had been alive or had retained up to the filing of the bill the rights he had when he executed the lease, to any relief in this Court. From the lease, on the assumption that it was accepted by the Company, certainly gave to the landlord the right of distress. He had also a right of action against the three persons named as lessees, if they had (as the evidence seems to import) consented to be so named: the entry of the Company was in that case as between the lessees and the lessor, an entry by them. If, on the other hand, the names of the lessees were inserted without their consent, then it would be open to Mr. *Ord*, the lessor, to contend that the lease was not such a lease as he was entitled to; that the Company was bound to obtain proper trustees, who should accept and execute the lease, and so give to him all the rights to which a lessor is ordinarily entitled. But this would be to all intents and purposes a bill for the specific performance of the agreement.

agreement for a lease, and then the reasoning of the Vice-Chancellor *Wood* would be strictly applicable. Not only is there in this case no specialty which would warrant a deviation from the ordinary rule against granting specific performance of a lease when the term has expired, but, on the contrary, there are circumstances which would make the exercise of such a jurisdiction peculiarly objectionable.

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The Vice-Chancellor has pointed out in his judgment the hardship which it would be on the Company to allow the lessor, after the lapse of about eleven years, to impose on its members onerous obligations, from which they might, at the end of every successive period of three years, have freed themselves, if he had seriously intimated his intention to hold them liable as his tenants. It is plain from all the correspondence, that none of the parties distinctly understood what their rights were, and if the lease of the 4th *March* 1842 is to be taken as showing what the Company was to be entitled to against Mr. *Ord*, as well as what he was to be entitled to against them, it is quite certain they never could have had what the lease purports to give them; for the lease includes all the mines comprised in the former leases of 1839 and 1841, as well as that demised for the first time by the new lease. Now as to 300 acres, parcel of the mine comprised in the leases of 1839 and 1841, it is certain that Mr. *Ord* had no title, and so could not have made an effectual demise. Indeed his inability to do so was one of the main grounds of the difference between him and the Company, which eventually led to the agreement of the 9th *October* 1841.

If then there could be no decree for a specific performance of an agreement for a lease, there cannot, for the reasons I have already intimated, be any relief at all in

it was therefore rightly dismissed by the Vice-Chancellor.

The Plaintiff relied mainly in his argument on the authority of a case of *Cluvering v. W* not, as I understand, cited before the Vice-Chancellor. There the Plaintiff, owner in fee of a coal mine, let a lease of it for twenty-one years to a person named *Reed*, who declared himself a trustee for himself and four other persons, who were to work the mine. These five persons worked the mine for some time, but afterwards abandoned it, the lessee having become insolvent and the mine unprofitable. The Plaintiff brought his bill against the five partners, including the lessee, and contended that they were all liable for the rent, as if the lease had been made to them alone, or that it had been assigned to them. But Sir Joseph Knight dismissed the bill, on the ground that the Plaintiff had no rights beyond his legal rights as lessor. The case was afterwards brought by appeal before Lord Talbot, who took a different view of the case, and held the partners liable both for past and future rents, giving credit however as to past rents for whatever the lessee had already accounted for to *Reed* the lessee, who was the managing partner. It is much to be regretted that we have no report of the grounds of Lord Talbot's decision. If he is to be taken as laying down a general principle, that whenever a legal lessee is trustee for another person, the rent becomes an equitable debt from the cestui

to be recovered by a bill in this Court, I must, with all respect, say that is a proposition to which I cannot assent. If there were in that case any special circumstances (which I do not collect from the report of the case), it would not govern the case now before me. I may further remark, that even if there was any such general doctrine as that to which I have alluded, namely, that the cestui que trust of a lessee is in equity liable to the landlord for the rent, yet it could hardly apply to a case like the present, where it is certain that the landlord never could have secured to the lessee a large portion of what he in terms demised. I do not, however, proceed on this distinction. I rest my judgment on the ground that no such general principle exists, and that in the absence of any such doctrine there is nothing to create the liability contended for.

I am therefore of opinion, that the Plaintiff's bill was properly dismissed, and so that this appeal must be dismissed with costs.

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June 8, 12,  
13, 28.

July 27.

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Lords Jus-  
tices,  
Mr. Justice  
Cresswell and  
Mr. Justice  
Erle.

The subscrip-  
tion contract  
of a projected  
Banking Com-  
pany, after  
reciting that  
the capital  
was agreed to  
consist of  
1,000,000*l.*,  
with power to  
increase it to  
3,000,000*l.*,  
and that ap-  
plication had  
been made to  
the crown for  
a charter, no-  
minated cer-  
tain persons

Directors until the charter should be obtained, with power for them to arrange the terms of the charter in such manner as they should think necessary in compliance with the requisition of the government, and to narrow or extend the objects of the Company as might be necessary. When the charter should have been sealed, the Directors were empowered to prepare a deed of settlement and to call for a first instalment from the subscribers, and to declare a forfeiture of the shares of any subscribers who did not execute such deed of settlement. A charter was obtained incorporating the Company, with a capital of 644,000*l.*, and power to increase it to 1,000,000*l.* with the consent of the Lords of the Treasury. A call was made and a deed of settlement prepared reciting the charter, the call and its payment by the parties to the deed of settlement:—*Held*,—

1. That the power of the Directors was not terminated on the grant of the charter.
2. That the charter was not inconsistent with the subscription contract.
3. That the call was properly made.
4. That the deed of settlement was binding on the subscribers to the subscription contract; but
5. That as the deed of settlement made the payment of the call a requisite preliminary, and the subscription contract did not make non-payment of the call a ground for forfeiture, the Directors could not declare a forfeiture for non-execution of the deed of settlement.

## NORMAN v. MITCHELL.

THIS was an appeal from the refusal of the Master of the Rolls of a motion for an injunction in a suit instituted by the Plaintiffs on behalf of themselves and all other the subscribers to a certain Banking Company called the Chartered Bank of *India, Australia and China*, (except such of the subscribers as were thereinafter named as Defendants,) against the directors and others and against the Chartered Bank of *India, Australia and China*.

The injunction sought was to restrain the directors, or any or either of them, from opening any branch or other banks or agencies, or issuing any notes, bills or other wise commencing or carrying on banking business, or otherwise acting contrary to the provisions of the charter, and from enforcing calls against the subscribers, and also from

from forfeiting or declaring to be forfeited, and from selling or disposing of as forfeited any shares or share in the Company. And to restrain two of the Defendants, *Joseph Harris* and *Thomas Ross*, or either of them, from executing a deed of settlement in the bill alleged to have been already prepared on behalf of the Plaintiffs or the other subscribers to the Company, or any of them, until the Defendants should have appeared to and fully answered the bill or the Court should make other order to the contrary.

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The facts appearing on the pleadings and affidavits are these:—In *October* 1852 a prospectus was issued for a projected Company, to be called the Bank of *India, Australia* and *China*, and to be incorporated by Royal Charter. The capital was to be 1,000,000*l.*, in 50,000 shares, with power to increase the same to 3,000,000*l.* The deposit was to be 10 per cent. Ten persons were named in the prospectus as directors, being the same persons as were afterwards named directors by the subscription contract. Applications for shares were to be made by a letter in the following form:—

“ To the Directors of the Chartered Bank of *India, Australia* and *China*.

Gentlemen,

“ I request you will allot to me                      shares in the Chartered Bank of *India, Australia* and *China*, the deposit on which or on any part thereof which may be allotted to me I engage to pay and all further calls that may be made, and to execute the deed of settlement when called upon.”

Many

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Many applications were accordingly made. They were accepted by a letter in the following form :—

“ Not transferable.

“ Letter , No. .

“ The Chartered Bank of *India, Australia and China.*

“ To be incorporated by Royal Charter.

“ Temporary Offices, 21, *Moorgate Street*  
*London, 1st November 1852*

“ Sir,

“ In reply to your application, you are hereby informed that the directors have allotted to you shares in the above Company.

“ You will be pleased to pay the deposit of 2l. per share thereon to Messrs. *Barclay, Beavan, Tritton and Co., 54, Lombard Street*, on or before *Monday the 8th* instant, or in default thereof this allotment will be cancelled.

“ I am, Sir,

“ Your obedient servant,

\_\_\_\_\_  
 “ Secretary pro tem—

“ To

“ N.B. The bankers' receipt will be exchanged for scrip at the Offices of the Company upon your signing the subscribers' deed, of which due notice will be given.

“ This letter to be taken to the bankers' entire.”

Deposits

Deposits were paid on 32,200 shares, for which  
bankers' receipts were given in the following form:—

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“ Letter , No. .

“ The Chartered Bank of *India, Australia* and
China.

“ To be incorporated by Royal Charter.

“ Temporary Offices, 21, *Moorgate Street*,
London, November 1852.

“ Received on account of the Directors of the Char-
tered Bank of *India, Australia* and *China*, the sum of
pounds to account for on demand.

“ £

“ For *Barclay, Bevan, Tritton & Co.*”

“ N.B. The receipt will be exchanged for scrip at the
Offices of the Company upon your signing the sub-
scribers' deed, of which due notice will be given.”

The directors named in the prospectus, when allotting
shares, agreed amongst themselves to take 1,000 each,
and each took from the secretary a letter of allotment
and paid the deposit of 2*l.* per share, obtained the
bankers' receipt and executed the subscription contract
(under seal), but they did not sign any letter of appli-
cation for shares nor was there any number of shares
placed opposite to their signatures to the subscription
contract.

The subscription contract was dated the 16th day of
November 1852, and was expressed to be made between
the several persons whose names and seals were or should
be thereunto subscribed and affixed, and who were there-
inafter called “ the subscribers,” of the one part, and
Joseph Harris and *Thomas Ross* (thereinafter called the
trustees) of the other part. It recited that the said several
subscribers

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subscribers had agreed among themselves to form a Company for the purpose of carrying on the business of banking by means of a head establishment in *London*, with branch banks or agencies in *India* and *Australia* and the other British possessions eastward of the *Cape*, and in *China* and the *Eastern Archipelago*, under the style of the "The Chartered Bank of *India, Australia* and *China*;" and that it had been determined that the capital of the said Company should consist of the sum of 1,000,000*l.*, to be divided into 50,000 shares of 20*l.* each, of which 32,200 had, in the first instance, been allotted, and the remainder would be allotted thereafter, with power to increase the capital to 3,000,000*l.* It further recited that a petition had been presented to her Majesty in Council for a charter conferring necessary powers and privileges on the Company, and especially the privilege of limited liability. And that the subscribers had respectively subscribed for such number of the shares in the capital of the said intended Company as were set opposite to their respective names subscribed to the deed, or to a duplicate thereof, and that each of the subscribers had paid into the hands of Messrs. *Barclay, Bevan and Co.* Company, the bankers, a deposit of 2*l.* per share upon the whole number of shares set opposite to the name of such subscriber, which was to be returned in full to each subscriber in case the charter should not be granted. It further stated that certificates of shares had been given to each subscriber of the number of shares subscribed for by him, and that as soon as the charter should be sealed the remainder of such 20*l.* share was to be paid up in such instalments as should be called up by the Board of Directors. It also recited that each subscriber had executed the deed as a preliminary or subscription deed, which was to define the rights and liabilities of the several subscribers, and to give to the Directors such powers and authorities for the establishment of the Company and for  
arranging

arranging for the charter and otherwise as were therein after provided, and that it was understood and agreed that the money raised by the subscriptions should be deemed and taken to be subscribed within the terms of the charter then about to be obtained, and, after some other recitals and an interpretation clause, the deed contained the following clauses :—

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“ 1. That they, the subscribers, or their respective executors or administrators, shall and will respectively pay all calls which shall be made upon them respectively by the Board of Directors as hereinafter provided in respect of the shares set opposite to their respective names and seals subscribed and affixed to these presents, or a duplicate thereof, and shall and will execute in due form of law the deed of settlement of the Company to be prepared as hereinafter mentioned: provided always that the deposit paid by each subscriber shall, from and after the completion of the charter, be taken and be deemed to have been paid in advance and on account of the full amount of the shares in respect of which such deposit has been paid.

“ 2. That the general objects of the Company shall be to establish one principal bank or banking establishment in London, and branch banks or agencies in such cities, towns and places in *India*, *Australia*, and other British Possessions eastward of the *Cape* and in *China*, and the *Indian Archipelago*, as shall be authorized by the Charter, and full power is given by the subscribers to the Board of Directors to arrange the terms of the charter in such manner as they may think necessary, in compliance with the requisition of the government or *East India* Company, or any other authorities, and to narrow or extend the objects of the Company as may be necessary.

“ 3. That

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"3. That each of the subscribers hereby authorizes the Board of Directors hereinafter mentioned to take all such steps as they shall think expedient for establishing the bank, and to take all such preliminary measures, and make all such preliminary arrangements, as may be deemed by them to be necessary or convenient, in order to the complete formation and constitution and commencement of the operations of the Company.

"4. That *Thomas Alexander Mitchell, Esq., M. P., James Wilson, Esq., M. P., Matthew Forster, Esq., M. P., Robert Lowe, Esq., M. P., Peter Bell, Esq., John Bagshaw, Esq., William Cook, Esq., George Carr, Esq., John Gladstone, Esq., W. S. Lindsay, Esq., and Joseph R. Morrison, Esq.,* are hereby nominated and appointed to be the Board of Directors to act until the charter shall be obtained, and when the charter shall have been obtained they or any of them may be named in the deed as the Board or Court of Directors.

"5. That the Board of Directors shall have full power at any time, and from time to time, to associate with themselves, as additional members of the Board, any number of subscribers they may think proper, without restraint of number, and to fill up any vacancy occurring in the Board by death, resignation or otherwise: provided always, that no person shall be capable of being a member of the Board unless he shall be a subscriber for fifty shares at the least, and shall have paid up his deposit, and shall continue a subscriber for fifty shares."

"7. That the Board of Directors shall have full power to appoint, suspend or remove and re-appoint bankers, solicitors, secretaries, clerks, agents and servants, and to pay and allow all such salaries and recompenses for services or works done, and expenses incurred in the furtherance of the objects of this undertaking,

ing, whether already done or incurred, or hereafter be done or incurred, as the Board of Directors shall their absolute discretion think fit.

8. That the Board of Directors shall have full power to invest the deposits in the purchase of any stocks, funds or securities, or to lend at interest on mortgage or otherwise, at their discretion, or to allow same to remain at the bankers, and shall not be responsible for any loss in respect thereof; and in case charter be granted, the Board of Directors shall have full power to pay thereout all or any of the expenses incurred by the members of the Board, or any of them, or by any persons or person on their or any of their behalf, or in furtherance of this undertaking, for any preliminary purpose whatsoever connected with, or in view to the formation of the Company, and in payment of all or any of such salaries or recompense, and payment of the expenses of all such inquiries, negotiations and other operations deemed necessary or expedient for the purpose of the undertaking, and in payment of costs and expenses incurred in the formation of the Company, or in or about or with reference to the soliciting or obtaining the charter, and all other costs, charges and expenses incident to the undertaking, including all commissions payable to brokers and others, whether in *Great Britain* or elsewhere, in respect of the allotment of the shares or otherwise, and all such costs, charges and expenses shall be payable out of the deposit as soon as the charter shall be sealed."

10. That when the charter shall be sealed the Board of Directors are authorized to cause to be prepared and engrossed a proper deed of settlement of the Company, containing all such covenants on the part of the shareholders, and all such other regulations and provisions, as the Board of Directors shall seem proper, and as may be

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be required by the terms of the charter or the Board of Trade or other competent authority."

" 12. That the Board of Directors shall have full power as soon as the charter shall be sealed to call upon the subscribers respectively for the payment of a first instalment or call on the shares subscribed for by them respectively, and from time to time to call upon the subscribers respectively for the payment of further instalments or calls on such shares respectively until the full amount of such shares shall be paid up, and to appoint a time and place for the payment thereof respectively."

" 14. That the subscribers, their executors, administrators or assigns, shall, before executing the deed of settlement, deliver up to the Company the scrip receipts or certificates for the deposit paid ; and if any subscriber, his executors, administrators or assigns, shall refuse or neglect to execute the deed of settlement of the Company for a period of one calendar month after the time appointed for the execution of such deed, then and in such case the Board of Directors may, if they think fit, authorize the deed to be executed on behalf of such subscriber by the trustees or either of them, or instead thereof, the shares of the subscriber so refusing or neglecting, and all sums of money paid thereon, may, at the option of the Board of Directors, be declared by the said Board of Directors to be forfeited, and the same shall become from thenceforth absolutely forfeited to the Company ; and in case of such forfeiture, the scrip receipts or certificates issued in respect of the shares so forfeited shall be of no effect whatsoever, and it shall thenceforth be lawful for the Board of Directors to dispose of such shares in the same manner as is hereinbefore provided with respect to such of the said 50,000 shares as shall not have been allotted or subscribed for ; and in case of forfeiture, such party shall, from and after such forfeiture, absolutely

**absolutely cease to have any right to be a member of the Company, and such forfeiture shall operate in full satisfaction to the trustees of the breach by the party so neglecting to execute the deed of settlement: Provided that it shall be lawful for the Board of Directors, upon any reasonable cause to them shown, and upon the due execution of the deed of settlement by the defaulting party to remit any such forfeiture.**

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On the 29th *December* 1853, the charter of incorporation was obtained. It recited (among other things) **that the persons thereafter named and others, had agreed to subscribe a capital of 644,000*l.* in 32,000 shares of 20*l.* each, and with power to raise a further sum not exceeding 2,000,000*l.* It incorporated the proprietors and declared the purposes of the incorporation. It contained a clause declaring, that unless it should be made to appear to the satisfaction of the Commissioners of the Treasury that the whole of the capital should have been subscribed under hand and seal within eighteen months from the date of the charter, and unless the whole sum of 644,000*l.* should have been actually paid up within two years from the date of a certificate—to be granted as therein mentioned, of the payment of one-half of 644,000*l.*—it should be lawful to declare the charter absolutely void. And it was thereby declared that the subscribers would, within twelve calendar months from the date of the charter, to the satisfaction of the Commissioners of the Treasury, enter into a deed of settlement, whereby provision should be made for carrying on the business of the Company by a Board of Directors to be elected by the shareholders, as in the said deed should be provided, and by a Board of Directors, till such election, to be provisionally named in the said deed, and whereby provision should be made for the payment by the shareholders of all monies to become**



executing these presents, become a shareholder party hereto. And every shareholder, party hereto, shall, at the time of executing these presents, deliver up the scrip receipt for the deposit paid in respect of his shares ; and the rights and liabilities under the recited indenture of the 16th of *November* 1852, of every shareholder, party hereto, in respect of the shares represented by the scrip receipt given up by such shareholder, and the rights and liabilities under the recited indenture of every subscriber thereto, whose scrip receipt shall be given up as aforesaid, shall, so far as regards the shares represented by the scrip receipt, be henceforth superseded by the liability and rights created under these presents: Provided always, that the liabilities of any subscriber to the recited indenture, whose scrip receipt shall not be given up as aforesaid, shall, in respect of the shares in such scrip receipt, and to the extent thereof remain in full force, and those liabilities may be enforced for the benefit of the Company.

4. That the several persons for the time being, holding shares in the capital, shall be members of the Company on the terms and provisions of the charter and these presents respectively, notwithstanding the whole of the shares be not taken.

5. That all things heretofore done by the persons acting as Directors, under the recited indenture, for the purpose of establishing the Company, shall be and are hereby adopted and confirmed, as if the same had been done after the establishment of the Company by the Court, under the authority of these presents, and all monies, costs, charges and expenses whatever, heretofore paid or incurred by them or by their order, or in relation to the establishment of the Company, not exceeding in the whole the sum of 2,000*l.*, shall be and are hereby allowed to them out of the funds of the Company, and they shall be and are hereby indemnified

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against



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against all losses and liabilities incurred by them in the premises.

7. That 644,000*l.* shall be raised for the purposes of the Company and according to the terms and provisions of the charter as its original capital, but such capital may be increased according to the provisions of the charter and of these presents.

10. That at any time after the whole of the original capital is subscribed for, and at least one-half thereof paid up, the capital may from time to time be increased to a sum not exceeding 1,000,000*l.* sterling, and with the consent of the Treasury, according to the charter, to a further sum of 2,000,000*l.*, making the aggregate capital 3,000,000*l.*

175. That in case and when it shall appear upon or be certified by any report of the auditors or any report of the Court, that one-half of the capital for the time being actually paid up, has been lost in the course of trade or otherwise, then the Company shall thereupon be *ipso facto* dissolved, and in case and when the powers and privileges granted by the charter shall cease, and the Company shall cease to be incorporated under the charter, then the Company shall thereupon be *ipso facto* dissolved, and in case and when it shall appear upon or be certified by any joint report of the Court and the auditors, that the business of the Company cannot be further prosecuted or that the affairs thereof cannot be arranged with a prospect of benefit to the Company, then the Company shall be dissolved at such period, not less than two months from the time of passing such resolution, as is fixed by such resolution, or if such period be not so fixed, then at such period not less than three months from the day of holding such meeting as the Court fix, unless such resolution of such meeting or of the Court, be revoked by an extraordinary general meeting held before the time fixed for such dissolution.

O

On the 7th of *April* the following notice was published :—

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"Chartered Bank of *India, Australia and China* (Incorporated 1853). The Court of Directors hereby give notice that all shares on which the call of 2*l.* per share is not paid on or before the 20th instant, will be forfeited."

The Plaintiffs and a large number of the subscribers declined to pay the call, and four of the Directors as constituting a quorum of the original Board of Directors named in the subscription contract, and also a quorum of the Court of Directors of the Company, passed a resolution on the 25th of *May*, whereby they declared that all and every the shares specified in the resolution, being respectively shares of subscribers who had refused or neglected to execute the deed of settlement of the Company, and all the deposits or sums paid thereon were forfeited. The shares so declared to be forfeited included the shares of the Plaintiffs.

The Plaintiffs then filed their bill in the present suit which (as afterwards amended) alleged, that the deed of settlement contained many clauses and provisions inconsistent with the subscription contract, and not contemplated by the charter, and prayed for an account of the shares originally allotted to the provisional Directors, and a declaration that they were bound to execute the subscription contract for the full number of such shares, and also for an account of the profits from the sale of such shares of which no regular allotment had been made, that a proper deed of settlement might be prepared and settled under the direction of the Court, in accordance with the terms of the subscription contract and duly executed ; and for a declaration that the charter

was

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was not binding, except so far as it was consistent with the subscription contract. It further prayed, that the Directors legally appointed might be ordered to apply for a rectification of the charter, and that the forfeiture of shares for the nonpayment of the call, might be declared void; and for an injunction nearly in the terms of the notice already mentioned.

On the 10th of *May*, a motion was accordingly made for an injunction before the Master of the Rolls, who refused the motion, reserving the question as to the Plaintiffs' costs, and making those of the Defendants costs in the cause.

The case is reported on the original application for an injunction in the 19th volume of Mr. *Beavan's Reports* (a).

On the appeal coming on to be heard, the following arrangement was made between the parties with the sanction of the Court:—

“ No answer to be called for till after motion. Motion to stand over, with liberty to amend the bill in eight days, in order that the following questions may be forthwith argued before the Lords Justices and two Common Law Judges, the decision on which questions shall be binding on the parties at the hearing as if then given.

1. Have the Defendants (naming them) now, and have they ever since the date of the subscribers' contract, or during any and what part of that time, had the powers and authorities intended to be given to Directors by the subscribers' contract?

2. Were the Plaintiffs, on and before the 25th *May* last, liable to pay the call?

3. *Is*

(a) *Page 278.*

3. Is the deed of settlement, as now prepared and settled, conclusively binding on the subscribers to the subscription contract?

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4. Have the same Defendants the power, in the event of a subscriber to the contract neglecting or refusing to execute the deed of settlement, as so prepared and settled, to forfeit his shares, and were the shares of the Plaintiffs duly forfeited by the resolution of 25th *May* last, marked (A)?"

The case accordingly stood over, and was argued on *June 27, 28.* these days by one Counsel on each side before their Lordships, who were assisted by Mr. Justice *Cresswell* and Mr. Justice *Erle*.

Sir *F. Kelly*, with Mr. *R. Palmer* and Mr. *Hetherington*, were for the Plaintiffs.

The *Solicitor-General* and Mr. *Cairns*, for the Defendants.

The arguments appear sufficiently from the opinion of the Judges.

After the arguments had been concluded, the learned Judges who assisted the Lords Justices in hearing the case, gave their opinion in writing, which, after a short preliminary statement, proceeded as follows:—

"My brother *Erle* and I, at the request of the Lords Justices, attended during the argument, and have been requested by them to give our opinion on four questions.

"The first of them is,—

"Have the Defendants, the present Directors, now,
and

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and have they ever since the date of the subscription contract, or during any and what part of the time, had the powers and authorities intended to be given to Directors by the subscription contract?"

In order to answer this question, it is necessary to consider the various proceedings that have been taken towards the establishment of the chartered bank of *India, Australia and China*. In 1852, a prospectus was issued for the bank of *India, Australia and China*, to be incorporated by royal charter, "Capital 1,000,000*l.*, with powers to increase the same to 3,000,000*l.*" Ten persons were named as Directors; the same that were afterwards named Directors by the subscription contract, and parties were directed to apply for shares by a letter in this form.

[Here followed the forms of applications and acceptances as above set out.]

It was contended by Sir *Fitzroy Kelly*, that the parties so named as Directors never had any power to act in that capacity, inasmuch as they did not subscribe the deed for fifty or any other number of shares, so as to satisfy the proviso contained in clause 5. It appears to us unnecessary to enter into an examination of the true meaning of that proviso, for we are of opinion that the parties named in clause 4, were thereby constituted Directors, without reference to the qualification required by the proviso, and that the necessity for such qualification did not attach to those nominated and appointed by the deed, but to those only who might be thereafter added to those named or substituted for them. They, therefore, when appointed by the deed, had the powers and authorities intended to be given to Directors by the subscription contract. But they were appointed to act

as Directors until the charter should be obtained, and upon that expression it has been argued that, as soon as the charter was sealed their authority ceased; and if there had been nothing in the deed at variance with that construction, it would probably have been considered that the authority of the parties named did cease as soon as the charter was sealed. But it is provided by other parts of this deed, that certain acts shall or may be done by the Directors as soon as the charter is sealed, *e. g.* by clause 10. [Here followed the 10th clause, as set out above.] Now up to this time we find no provision made for appointing Directors, save that in the subscription deed. They therefore must be the parties to prepare the deed of settlement mentioned in the 10th clause.

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Again, clause 12 provides—[Here followed the 12th clause set out above.] If, therefore, the power of the Directors were to cease altogether on the granting of the charter, it would be impossible for them to do those things which the deed in terms authorized them to do. We are, therefore, of opinion, that notwithstanding the introduction of the word *until* into clause 4, the powers intended to be given by the subscription contract would continue until superseded by the deed of settlement. By the 1st clause of that deed it is declared—[Here followed the 1st clause set out above]. The deed of settlement, therefore, does not supersede the subscription contract as to those whose scrip receipts have not been given up, and the powers intended to be given to the Directors by that instrument still continue with regard to such parties. It was contended in argument that the power given to the Directors was given to ten, and that as two afterwards resigned, those powers could not be exercised by the remaining eight. Probably it was considered (and we think rightly) that the Directors were made a quasi body corporate, and that

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that as long as there remained enough to constitute a quorum their powers might be exercised notwithstanding the diminution of their number. Our answer to the first question therefore is,—That, as regards the Plaintiffs who have not given up their scrip receipts, the Defendants, the present Directors, now have, and ever since the date of the subscription contract have had, the powers and authorities intended to be thereby given to Directors.

The second question proposed to us is, "Were the Plaintiffs, on or before the 25th of *May* last, liable to pay the call?" Assuming that the Defendants, the present Directors, have had ever since the date of the subscription contract, and still have as regards these Plaintiffs, the powers and authorities intended to be given by the subscription contract, we think it follows that the Plaintiffs were on and before the 25th of *May* last liable to pay the call. The subscription contract gave the Directors power to make a call as soon as a charter was sealed. A charter was sealed before the call was made, and the Plaintiffs claim to be members of the corporation created by that charter. It is, therefore, difficult to understand how they can resist the payment of the call on account of any supposed objections to that charter. In order to make out that a charter had not been granted, it was necessary to show that the Directors had no authority to accept such a charter for the subscribers, and that consequently they could not be treated as members of the body corporate, and therefore as to them no charter had been sealed; but we think that if it had been so contended the argument would have failed. Sir *Fitzroy Kelly* did not, however, contend that the charter was to be treated as a nullity. Two objections to it were nevertheless urged: one, that it appeared to have been granted on a false recital, and therefore might at any time be repealed.

pealed by *scire facias* ; the other, that the subscription contemplated a Company to be incorporated with an original capital of 1,000,000*l.*, with power to increase to 3,000,000*l.*, whereas the charter was to a Company with a capital of 644,000*l.* only, with power to increase to 1,000,000*l.* by consent of the Lords of the Treasury, and to 2,000,000*l.* by the consent of the shareholders at general meeting and the Lords of the Treasury ; but without any power to raise the capital above that sum. It appears to us that the charter is not open to either of these objections. Before the application for the charter 2,000 shares had been allotted and deposits on them paid ; no agreement had been entered into to pay calls on more than those shares ; the sum agreed to be subscribed was 644,000*l.*, as recited in the charter. There was a proposition in the prospectus with reference to which the applications for shares were made, that the capital originally raised might be increased by two millions, which is also recited in the charter. Nothing was said as to the amount of capital intended to be raised at the first instance, except that the parties had agreed to subscribe 644,000*l.*, which was true. In this, then, we find no deception practised on the Crown which could render the charter voidable, nor do we think it can be objected to on the ground that the Plaintiffs in this suit did not authorize the Directors to accept such a charter. The 2nd clause of the subscription contract is in these terms—[Here followed the 2nd clause set out above].

The petition was for the incorporation of a Company to have a capital of 1,000,000*l.*, with power to raise it to 3,000,000*l.* ; it must be presumed, therefore, that the Crown imposed the alteration as to the amount, and the large discretion vested in the Directors by the clause of the subscription contract above referred to in our judgment authorized them to accept the charter in its present form.

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form. We are, therefore, of opinion, that before the call in question was made the event happened on which the power of the Directors to make a call was to arise, and, consequently, that it was made by due authority, and that the Plaintiffs were on and before the 25th of *May* liable to pay it.

The third question proposed to us was, "Is the deed of settlement, as now prepared and settled, conclusively binding on the subscribers to the subscription contract?" For the Defendants, it was contended that the deed of settlement was an element in the constitution of the Company, and was to be considered as embodied in the charter, and therefore conclusively binding on all who claim to be members of the incorporated Company. Both the subscription contract and the charter require that a deed of settlement shall be prepared and executed, and it is to be prepared to the satisfaction of the Lords of the Treasury; and the charter declares, "that the several regulations, contained in the charter, and to be contained in the said deed, or to be contained in any bye-laws to be made in pursuance thereof, or in any supplemental deed to be made in pursuance of such first-mentioned deed, shall be taken to be the existing regulations of the said Company, except so far as the same may be repugnant to the laws of our realm or of any of our colonial possessions, settlements or dependencies, wherein the Company shall carry on business." This, however, does not in our judgment incorporate the deed in the charter or make it conclusively binding on the original subscribers. It does not appear that the Lords of the Treasury required that the deed should be in its present form, although they sanctioned it; and if the deed, on examination, is found to contain matters beyond the scope of the authority vested in the Directors, the members of the incorporated Company would not be bound to execute it. It is therefore

therefore necessary to examine the several objections that were made to it during the argument. They were founded on clauses 4, 5, 7 and 175. The first objection was not much insisted on, nor do we think it necessary to notice it further than by saying that we think it untenable. The second objection was to the 5th clause—[Here followed the clause as set out above.]

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We cannot say that such a clause is improper, considering the very large discretion, vested in the Directors by the 3rd, 7th and 8th clauses of the subscription contract and the absence of any evidence, that this indemnity was introduced to cover any misconduct on the part of the Directors. The clauses of the subscription contract referred to were in the following terms—[Here followed the 3rd, 7th and 8th clauses set out above.]

The 7th clause of the deed of settlement, providing that the capital to be raised shall be 644,000*l.*, was next objected to, but it is exactly in accordance with the charter, and if the charter is good, this must be good also.

The next objection was to the 10th clause — [Here followed the clause as set out above.] It was said that as the charter does not in any event authorize an increase of the capital beyond 2,000,000*l.*, this clause would sanction a violation of the charter, and therefore the members of the Company cannot be called upon to execute such a deed. But it seems to us that this objection fails. Omitting the words of addition at the end of the clause, it may, and perhaps ought, grammatically to be construed, so as to be in conformity with the charter; for the capital is to be increased *to* the further sum of 2,000,000*l.*, not *by* the further sum, and therefore it may well have been the intention to take power to increase it no further than was really contemplated by the charter,

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charter, and the words of addition may have been introduced by mistake, and have no operation. But if the meaning was, that the capital might be increased to 3,000,000*l.*, it was still to be done according to the charter, and if the charter contains no provision for doing it, the clause would be simply inoperative.

The last objection was founded on the 175th clause, which was said to be incomprehensible and incapable of being carried into effect. We cannot say that it is incomprehensible, nor that it cannot be carried into effect; and, although it may create considerable difficulties in winding up the affairs of the Company under certain circumstances, we cannot on that ground say that it is not such a clause as the Directors were authorized to introduce. No deed of settlement could ever be effectually prepared if the Directors were bound to introduce all such arrangements as all the members will agree in thinking the best possible for effectuating the objects of the Company, and therefore, in this instance, we find, as might be expected, a large discretion vested in the Directors by the subscription deed as to the preparation of the deed of settlement. The charter compels the Directors to introduce certain specified provisions "in addition to such further provisions as shall be by the Lords of the Treasury considered necessary and usual in like cases for the management of the affairs of the Company." We have not been informed whether the clause in question was introduced by desire of the Lords of the Treasury. If it was, that puts an end to the objection; if it was not, still it is a clause for regulating the affairs of the Company, and within the scope of the authority given to them by the 10th clause of the subscription deed, and we feel that it is not within our province to attempt to decide whether it is a wise and prudent clause or not. Upon the whole, then, we are of opinion that the objections to the

the deed of settlement fail, and that the members of the Company were bound to execute it.

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The fourth question proposed to us is, "Have the Defendants power, in the event of a subscriber to the contract neglecting or refusing to execute the contract as so prepared and settled, to forfeit his shares, and were the shares of the Plaintiffs duly forfeited by the resolution of the 25th of *May*?" By the 14th clause of the subscription deed power was given to the Directors to declare forfeited the shares of any subscriber refusing or neglecting to execute the deed of settlement for the period of a calendar month after the time appointed for the execution of it, and inasmuch as we think that the deed in question was such as the subscribers might be called upon to execute, it follows that these shares might be declared forfeited for refusing or neglecting to execute it. It is not expressly stated in the proceedings whether the present Plaintiffs were called upon or informed that they would be permitted to execute the deed without paying the call, and, in the absence of any express information, considering that the deed contains a recital that the call had been paid, and that the notice of the call required it to be paid on or before the 20th of *March*, and the same notice stated that the deed of settlement would be ready for execution on the 20th of *March*, we cannot but assume that the subscribers were intended to understand that they must first pay the call and then execute the deed. Now, the subscription contract contains no power to declare shares forfeited for nonpayment of calls, and the Plaintiffs never in any other way gave the Directors power to do so, and if the Directors called upon the subscribers first to pay the call and then execute the deed, and declared the shares forfeited because the deed was not executed, that was in effect declaring them forfeited for nonpayment of the call.

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call. This was not within the powers conferred on the Directors, and we are of opinion that the shares were not duly forfeited.

C. CRESSWELL.  
 W. ERLE.

July 27.

*The* LORD JUSTICE KNIGHT BRUCE.

This application, though at first one of appeal, has substantially become an original motion, for after the opening had proceeded some way, an arrangement was made between the parties by their counsel, which was embodied in a writing thus expressed :—

[His Lordship read the terms of the arrangement.]

Accordingly, under this arrangement, the bill was amended, both by adding the Banking Company itself as a corporate or quasi corporate body to the Defendants, and otherwise materially, and the motion having been afterwards renewed, was then argued by one counsel on each side before my learned brother and Mr. Justice *Cresswell*, Mr. Justice *Erle* and myself. We have all since considered the matter, and the two learned Judges not now present having transmitted to us their written opinion, upon the points to which their attention was addressed, I proceed to read it :—

[His Lordship read the Judges' opinion set out above.]

I need scarcely say how much indebted we feel to Mr. Justice *Cresswell* and Mr. Justice *Erle*, for this valuable assistance on their part. Now, as to our judgment, or at least mine, upon the motion,—considering its merely interlocutory nature and the difficulty (at least, in my

my opinion) of the questions raised by it, or of more than one of them,—and (without forgetting the weight belonging to the joint opinion that I have just read) considering the degree of inconvenience likely to result from a decision, upon this occasion too much in accordance with the wishes of the Plaintiffs, as compared with the degree of inconvenience likely to result from a decision too much otherwise,—a view of the matter, in which, (with reference to the recent cases of *Young v. Raincock* (a), and *Stronghill v. Buck* (b), and the authorities there mentioned) we must particularly not lose sight of a portion of the contents of the deed of settlement, which I will now read :—

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“ And whereas the several shareholders, parties hereto, have agreed to become shareholders of the Company, for the shares on the capital thereof, set opposite to their respective names in the second schedule to these presents, and have on those shares paid, before the execution hereof, 2*l.* a share in addition to the 2*l.* a share paid by way of deposit in respect of such share, making together 4*l.* a share, and have agreed to execute these presents as the deed of settlement of the Company, required by the said royal charter,”—

Considering, I say, these things, I think that the proper course for us to take on the motion will be, that, leaving the Rolls order undischarged, and leaving the Defendants respectively at liberty to bring and proceed with such actions as they may be advised, we should grant an injunction or injunctions thus and only thus far,—namely, in these words taken from the prayer of the amended bill (which departs, I believe, somewhat in language from the notice of motion) “ to restrain

(a) 7 C. B. 310.  
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(b) 14 Q. B. 781.  
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restrain the Defendants *Thomas Alexander Mitchell, Peter Bell, John Bagshaw, William Cook, George Bowness Carr, John Gladstone, William Schaw Lindsay, Joseph Robert Morrison* and *William Nicol*, and the Company from forfeiting or declaring to be forfeited any shares in the said Company, on the ground either of nonpayment of any call or of nonexecution of the said deed of settlement, and from selling or disposing of as forfeited, any shares or share in the said Company, and to restrain the last-named Defendants from directing or permitting the Defendants *Joseph Harris* and *Thomas Ross*, or either of them, to execute, and the said Defendants *Joseph Harris* and *Thomas Ross*, from executing the deed of settlement alleged to have been already prepared on behalf of the Plaintiffs or the other subscribers to the said Company, or any of them." But that this injunction, or these injunctions, should be only until further order, with liberty to apply.

The LORD JUSTICE TURNER.

The injunction which is asked for by this notice of motion is to restrain the Defendants, the Directors, 1st, From opening any branch or other banks or agencies, or issuing any notes or bills, or otherwise commencing or carrying on banking business, or otherwise acting contrary to the provisions of the charter. 2ndly, From enforcing the call already made or any other call against the Plaintiffs or any other of the subscribers to the Company; and, 3rdly, From forfeiting or declaring to be forfeited and from selling or disposing of as forfeited any shares in the Company; and the motion also asks to restrain the execution of the deed of settlement of the Company by the Defendants *Harris* and *Ross* on behalf of the Plaintiffs or the other subscribers to the Company, or any of them. The opinion which has been given by the learned Judges who have assisted us in this case

upon

upon the points submitted for their consideration, seems to me to remove all difficulty in disposing of the first three branches of this notice of motion. The learned Judges have certified their opinion to be that the Defendants the Directors have as against the Plaintiffs the powers and authorities given to Directors by the subscription contract;—that the Plaintiffs are liable to pay the call, and that the members of the Company are bound to execute the deed of settlement, but that the shares have not been duly forfeited.

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From these data it seems to me very clearly to follow, that the Plaintiffs can have no injunction either upon the first or the second branch of the motion. In order to entitle them to such an injunction it would be incumbent upon the Plaintiffs at least to shew a *prima facie* case; but, according to the opinion of the learned Judges, they have shown no such case, and, on the contrary, have shown themselves to be wholly in the wrong. The powers given by the subscription contract subsist against them, and they are bound to pay the call and to execute the deed of settlement. Under these circumstances this Court certainly could not be warranted in granting an injunction upon these points.

As to the third point, on the other hand, it seems to me to be equally clear that some injunction ought to be granted. The power to forfeit shares subsists as against these Plaintiffs only for the nonexecution of the deed of settlement, and the deed of settlement which the Defendants have prepared recites the payment of the call. The Defendants, therefore, have placed the Plaintiffs in the position that they cannot properly execute the deed of settlement until they have paid the call; and to permit them, under these circumstances, to declare a forfeiture for nonexecution of the deed would be to give them

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power

The fourth and last branch of the injunction is to restrain the execution of the deed of set the Defendants *Harris* and *Ross* on behalf of tiffs or the other subscribers; and as this case present, I think this part of the motion must be granted, and I think so for these reasons:—The deed of settlement recites the payment of the call. The payment of a call is an act to be done by the subscribers. It is much doubt whether the power given by the deed of settlement to *Harris* and *Ross* to execute the deed templates the existence of any intermediate act done by the subscribers before the execution of the deed. But whether it be so or not, I think that the effect of the deed of settlement by *Harris* and *Ross* on behalf of the subscribers would, to say the least, create a right to the recovery of the call which has been paid by the Defendants the Directors would not be notified in creating. Of course, however, neither the injunction nor the injunction as to the payment of the call can be granted otherwise than until further order.

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In the Matter of the EASTERN COUNTIES
JUNCTION AND SOUTHEND RAIL-
WAY COMPANY

and

In the Matter of the JOINT STOCK COM-
PANIES WINDING-UP ACTS, 1848
AND 1849.

UNDERWOOD'S CASE.

THIS was a motion on behalf of the official manager
of the above-named Company, that an order made
in the above-mentioned matters by the Vice-Chancellor
Sir John Stuart on the 14th of June 1854, might be
discharged or varied.

July 20, 21, 22.
Before The
LORDS Jus-
TICES.

In 1851 a
managing di-
rector of a
provisionally
registered pro-
jected Railway
Company sub-
been mitted to be
placed on the

list of contributories under the Winding-up Acts, on the authority of *Upfill's Case*. On
a call being made in 1854 on him and other contributories for the costs of winding-up
the Company, he appealed, and at the same time moved that his name might be re-
moved from the list of contributories on the ground of the law being changed by *Bright's*
Case. The Vice-Chancellor (having directed the notice of motion to be served on the
other contributories and the creditors who had proved) made an order staying all
proceedings under the winding-up order:—*Held*,

1. That such an order could not properly be made on the motions before the Vice-
Chancellor, some of the persons served not having appeared.

2. That *Bright's Case* having been decided in 1852, the application of the con-
tributory in 1854 to be relieved from his submission to be placed on the list was made
too late.

3. That the call for costs would have been properly made if there had been a proper
list of contributories; but,

4. That there being no list properly settled, but merely one having in many
instances informal abbreviations placed opposite the names in the list, and in others
marks importing that the case of the person named was adjourned, without showing
that it could not have been disposed of, no call could in that state of the proceedings
be properly made.

5. That persons who have notice of a compromise between the official manager and
any contributories must, if they wish to disturb it, take proceedings at once for that
purpose.

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 CASE.

been served with a notice of motion of that date by Mr. *Underwood*, one of the contributories, to discharge an order for a call.

Pending this notice to discharge the call, a second or supplementary notice, dated the 11th of *May* 1854, was served on the official manager by Mr. *Underwood*, to have his name removed from the list of contributories, or, if it should be retained on the list, then to discharge an order of the Master approving of a compromise with certain persons, being five of the contributories.

Upon these motions coming on, on the 30th of *May*, the Vice-Chancellor ordered, that they should stand over until all the creditors and contributories of the Company, or such of them as Mr. *Underwood* might be advised to serve, should be served with notice of the motions.

The motions came on again for hearing, eight additional persons having been brought before the Court, viz. *Robert Andrew Riddell*, *William Alexander Thomas*, *William Wright*, *Charles Grant* and *Thomas Gaszell* (being the five contributories with whom a compromise had been effected by order of the Master), *Nathaniel Cooke* (the petitioner for the winding-up order), *Herbert Ingram* (one of the managing committee), and a person who had been struck off the list of contributories, but to whom costs were payable by the official manager out of the estate.

On that occasion, after the counsel for Mr. *Underwood* had addressed the Vice-Chancellor, his Honor desired in the first place to hear the question argued, on behalf of the official manager, whether the original winding-up order could be sustained. At the conclusion of the argument the Vice-Chancellor made the order under appeal, which,

which, after reciting the notices of motion and the evidence, proceeded thus :—" And it appearing that the said proposed Company never was formed, and never transacted or carried on any business as a Company, and never contracted any debts as a Company, and that there are no affairs of the said Company which have been or can be wound up pursuant to the order of this Court, dated the 25th day of *January* 1850, this Court doth order that the order of the Master for a call, bearing date the 27th day of *April* 1854, be discharged; and it is ordered, that all further proceedings under the said order to wind up, of the 25th day of *January* 1850, be stayed, except that the official manager, and any person interested, are to be at liberty to apply to the Master or to this Court as they may be advised."

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The case of the official manager was, that Mr. *Underwood* was a member of the managing committee of the Company; that his name was printed as such in the prospectus registered at the Office for Registration of Joint-Stock Companies, and in the prospectus entered in the minute book of the Company, and that in that capacity communications took place between him and the secretary from time to time during a period extending from the 4th of *October* 1845, to the 20th of *May* 1846, inclusive.

Among these communications were the following :—

" *Eastern Counties Junction and Southend Railway Company.*

Off. 33, B. S. Bgs.

" Sir, *London, 6th October 1845.*

I am instructed by the committee of management to inform you, that, by a resolution passed by them, you are, as a member of the provisional committee, entitled to 100 shares in this Company, or any less number you

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may wish, provided you signify in writing, on or before the 9th instant, the number you are desirous of taking.

R. H. Causton, Secretary."

The secretary received on the 9th of *October* the following reply:—

" 25, *Eastcheap*, Oct. 9th, 1845. .

" Sir,

" I will take the 100 shares you name, and will agree to take 200 more if they can be allotted to me.

" I am, Sir,

" Your obedient servant,

" *R. H. Causton*, Esq.

J. Underwood—

Mr. *Underwood*, however, declared, in his examination before the Master, that this letter was a forgery.

On the 12th of *November* 1845, the secretary wrote to Mr. *Underwood* as follows:—

" Sir,

" I beg to apprise you that to-morrow is the day advertised for issuing the scrip, and that at present the name of one director only is attached to a very small proportion of it, the names of two being required. I shall therefore feel obliged if you will give your attendance at the Office for a short time this afternoon.

" *R. H. Causton*, Secretary."

Mr. *Underwood* replied on the same day, as follows:—

" *Eastcheap*, Nov. 12th, 1845.

" Dear Sir,

" I can assure you that I have every inclination to be of use to your railway, but I have not a moment to spare. I left here at eleven this morning, and have this moment returned at six, and to-morrow I am particularly

ticularly engaged all day, but soon as I have an hour to spare, I will give you a call.

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"Believe me yours,

"*R. H. Causton, Esq.*

J. Underwood."

On the 14th of *November* 1845, Mr. *Underwood* wrote to the secretary, as follows :—

"25, *Eastcheap*, 14th *November* 1845.

"Dear Sir,

"My time being so fully occupied, that I find it quite impossible to attend the duties of a director in the *Eastern Counties Junction Railway*, I therefore, with much regret, beg of you to withdraw my name from the committee of management, as I do not consider it honourable to keep my name there and not be able to attend to the duties, which I trust will be sufficient excuse.

"I have a strong feeling in favour of the line, and have no doubt, from all that I hear, you will succeed.

"I beg you will convey my best thanks to the chairman and directors.

"I am, dear Sir, &c. &c.,

"*R. H. Causton, Esq.*

J. Underwood."

On the 17th of *November* 1845, the secretary replied as follows :—

"*London*, 17th *November* 1845.

"Sir,

"I duly received your favour of the 14th instant, and have submitted the same to the Board of Directors, who have requested me to inform you that they have unanimously resolved at present your resignation be not accepted.

"*R. H. Causton."*

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In *January* 1851, Mr. *Underwood* submitted to be placed upon the list of contributories, conceiving (as it was now alleged on his behalf) that in the then state of the authorities, he could not dispute his liability without proceeding to impeach the genuineness of his alleged signature to the application for shares, which, although able to do, he wished to avoid doing.

In *June* 1852, a call for costs was made, against which Mr. *Underwood* did not appeal, although other contributories did.

On the 18th of *November* 1853, an order was made by the Master sanctioning a compromise entered into between the official manager and five of the contributories, by which, on payment by the latter of 120*l.* each, they were discharged from all right, title, claim or demand which the Company or the official manager had or might have against them respectively as contributories or otherwise howsoever. The above amounts were paid, and the contributories, thus settled with, were not afterwards served with any notices of the proceedings under the winding-up order.

On the 27th of *April* 1854, the Master made the call now in question on the seventeen remaining contributories, including Mr. *Underwood*, for payment of 150*l.* each, in respect of the costs, charges and expenses of winding up the Company.

Mr. *Underwood* thereupon gave the notices of motion before the Vice-Chancellor above mentioned.

On

On the production of the list of contributories before the Lords Justices, there appeared written in pencil, opposite to Mr. *Underwood's* name, the letters "adj^d." The same mark was set opposite other names in the list. In another part of the proceedings, however, the word "settled" was found placed opposite to Mr. *Underwood's* name.

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The other facts of the case appear sufficiently from the judgments.

Mr. *Malins* and Mr. *Roxburgh*, for the official manager.

The Vice-Chancellor's order is completely at variance with your Lordship's decision in *Carew's Case* (a). The proper decision would have been to dismiss the appeals. As to the appeal from the refusal to remove Mr. *Underwood* from the list of contributories, it is sufficient to say, that the application for the removal was made far too late. Mr. *Underwood* was placed on the list on his own submission in 1851. He says that he was misled into making this submission by *Upfill's Case* (b). But that case had been in substance reversed in 1853, and it was not till 1854, nor until many steps had been taken on the faith of Mr. *Underwood* being on the list, that he applied to be removed from it. He cannot now be relieved from the effects of his submission. Moreover he is not within *Bright v. Hutton* (c), being a managing, and not merely a provisional, committeeman.

The applications to be relieved from the call and to set aside the compromise are equally unsustainable. The call is for costs, and Mr. *Underwood's* liability to pay it follows from his remaining on the list of contributories,

(a) *Ante*, p. 94.

(b) 2 H. of L. Cas. 674.

(c) 3 H. of L. Cas. 341.

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butories, *Gay's Case* (a); and with regard to the compromise it is now too late to attempt to disturb it.

Mr. *Wigram*, Mr. *Bacon*, Mr. *Selwyn* and Mr. *Little*, for the parties to the compromise, opposed the motion seeking to set it aside.

Mr. *Craig* and Mr. *Locock Webb*, for Mr. *Underwood*.

Although the Vice-Chancellor's order may not be one of an ordinary kind, it meets the substantial justice of the case, and is within the discretionary power of the Court under these Acts. But if it should not be sustained, then Mr. *Underwood* insists that his appeal ought to be allowed. As to the removal of his name from the list, his submission proceeded upon the then state of the law, which was supposed to have been conclusively settled by the House of Lords in *Hutton v. Upfill* (b); and according to which the united facts of an individual being a committeeman and having applied for shares were sufficient to place him on the list of contributories, although neither circumstance could alone have that effect. That state of the law has now been changed, and, according to *Bright v. Hutton* (c), Mr. *Underwood* was not liable to be placed on the list. For the distinction now relied upon between a managing and a provisional committeeman is quite new, and is not made in any act of parliament or any decided case. Provisional committeemen are managing committeemen while they act, and all the reasons applicable to one apply to the other. Moreover no share was ever allotted to Mr. *Underwood*, and as to the lapse of time it is not great, and is unimportant unless some prejudice is shown to have arisen from it, which is not the case here; *Crasfield's*

(a) 1 De G., M. & G. 347.

(b) 2 H. of L. Cas. 674.

(c) 3 H. of L. Cas. 341.

field's Case (a); the call, therefore, is also improper as regards Mr. *Underwood*. With respect to the compromise with the other contributories, if Mr. *Underwood* is to continue on the list he is entitled to have that compromise set aside, for no sufficient notice was given to him of the negotiation for it.

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They referred also to *Besley's Case* (b); *Wryghte's Case* (c); *Carrick's Case* (d); *Tanner's Case* (e); *Robert's Case* (f); *Hunter's Case* (g).

During the arguments, their Lordships inquired whether Mr. *Underwood* was ready to repay to the contributories, who entered into the compromise, the amounts (120*l.* each) which they paid.

Mr. *Craig* and Mr. *Locock Webb* replied in the affirmative.

Mr. *Roxburgh*, in reply.

The LORD JUSTICE KNIGHT BRUCE.

The order before us is the result of an anxious desire on the part of a learned Judge of this Court to do complete justice in a case of considerable complication,—perhaps, it would not be too much to add,—vexation, nor, perhaps, would it be too much to describe it as a case that ought never to have been brought into the Court at all. His Honor's order appears to me, at least, so likely,
 from

(a) 2 *De G., M. & G.* 128.

(b) 2 *Mac. & Gor.* 176.

(c) 2 *De G., M. & G.* 636.

(d) 1 *Sim. N. S.* 505.

(e) 5 *De G. & Sm.* 182.

(f) 1 *Drew.* 205.

(g) 1 *Sim. N. S.* 435.

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from the circumstances that have been brought before us, to be agreeable to what may be called the moral merits of the dispute, that it is not without regret that I find myself bound by the view that I take of rules and precedents, from which we are not at liberty, I think, to depart, respectfully to dissent from what he has done. Certain notices of motion, having particular and defined objects, were brought before his Honor. To the discussion of those motions certain parties were requisite, either in point of presence, or through service, which would place them, in a sense, in default for not being present. And it is, I apprehend, a rule of the Court, from which the Court is not at liberty to depart, that where a necessary party to a motion (that is, necessary, in point either of presence or notice), being served, does not appear, the terms of the notice cannot, so far as his interest is concerned, be materially departed from. Now, however right the present order may be, and, I would almost venture to say, probably is, in point of moral justice, it certainly does exceed the rules, that I have mentioned, namely, it affects the interests of necessary parties to the motion, who did not appear upon it, to an extent and in a manner going materially beyond the language of the notices. I think therefore that we must treat the case as not affected by the order which his Honor has made, and consider ourselves as rehearing the notices of motion, which were given before him.

The first branch of these was to remove Mr. Underwood from the list of contributories. The "list of contributories" is an expression to which I shall have occasion to advert again presently. In using the expression now I do not use it in a technical or confirmed sense. If there is no list of contributories, there is nothing from which Mr. Underwood can be removed.

If

If there is a list of contributories, or if he is already set down as a person who ought to be placed upon a list of contributories when completed, it seems to me that he is rightly there, and has not shown a case for having his name removed. It appears that there was a contest, which began before or in the month of *January* 1851. Upon the question, whether Mr. *Underwood* should be treated by the Master as a contributory, a dispute arose which involved a very disagreeable discussion, not the only point in dispute, but one singularly untoward; namely, a question whether a letter purporting to be written by Mr. *Underwood*, purporting to be signed by him, and sealed with the seal of a club to which he is said to belong, was in fact written by that gentleman; he having sworn that it was not. As I have already said, a much more unpleasant discussion could hardly be conceived. That discussion and the expansion of evidence on that and the cognate subjects were prevented and stopped by Mr. *Underwood* (still denying that the letter was his), saying that he was nevertheless willing to be treated as a contributory; and accordingly (*re infectâ*, as far as evidence and argument went),—upon his own submission, he was, at that period, placed on the list of contributories, or so marked as necessarily to be on the list, in the Master's judgment, whenever a list there should be.

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The first of these notices of motion was more than three years after this month of *January* 1851, and seeks upon the ground of a supposed (not change in the law—that would be a very inaccurate phrase, but) change of views of the law, on the part of those who had to administer the law (and not alone on that ground), that this submission of his upon the occasion which I have mentioned should go for nothing. Now, considering the particular circumstances

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circumstances to which I have adverted, and considering that at the period I have been mentioning there was a possibility of benefit (as in some few cases has happened) arising to Mr. *Underwood* from the circumstance of his being in that position, I think it would be unsafe, and not according to a reasonable and discreet course of administering justice, to accede to Mr. *Underwood's* demand, in the year 1854, to be relieved from the position in which he had deliberately submitted to be placed in the early part of the year 1851. That part of his application therefore must be refused.

The next question relates to a matter involved, I think, still in some degree of obscurity, and on which, speaking for myself alone, my mind is not at present satisfied; namely, a compromise, made between certain members or alleged members of the association, the subject of the order for winding up, by means of which, upon payment of 120*l.* or 130*l.* each, five gentlemen (I think) in all were, with the Master's sanction, released from all further liability—a compromise effected, it seems, against the opinion of the official manager, who, however, on the sanction of the Master being obtained, acted upon it, as it seems with sufficient promptness. We were of opinion, that, whatever might be thought of the compromise, we could not enter upon the discussion of it, unless on the production of the money that the compromising gentlemen had paid. That difficulty has now been removed. Mr. *Underwood's* sincerity being put to the test, he has expressed his ability and willingness to comply immediately with that condition, if the Court should think it right to discharge the order for the compromise. The question upon that compromise we have not heard fully argued, and perhaps were we to hear the arguments of Mr. *Wigram* and Mr. *Selwyn* on the point, they would remove the

the doubt, which at present I alone feel, as to the propriety of the compromise, and upon the question whether it should stand. It is (as I have said) only a doubt and a doubt entertained without having heard the whole argument. My learned brother, however, is satisfied, upon what he has heard, that the compromise ought not to be disturbed. It cannot be disturbed here without an order proceeding from both of us, and, therefore, cannot be disturbed here at all.

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The remaining question is as to the call, which has been impeached on various grounds, some relating to the point of the propriety or impropriety of the original order for winding-up made several years ago—I think so long ago as the year 1850. Now there was no application before the Vice-Chancellor, nor is there any application before us, to discharge the winding-up order; and whatever suspicion it may or may not be proper to entertain as to the order, whether it is or is not likely that it would, upon an application to discharge it, be discharged, we cannot, upon the present occasion, look into that point; we must treat it as a valid and subsisting order. Treating it as a valid and subsisting order, it must be impossible to deny that some costs have been incurred, which must be provided for upon the assumption now to be made, that the order is to stand. Therefore, the order standing, that there must be some call at some time seems plain enough; but the difficulty that I feel, and, I believe, my learned brother feels also, is to be satisfied that there has been any such list of contributories made up as the act of parliament requires. The only list of contributories produced to us has a column filled with words most or all of which are abbreviations written with a pencil (a circumstance not very germane to the notion of a record), and in the list, so marked, the name of Mr.

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Underwood (the person complaining here) is mentioned as the name of an alleged contributory whose case is adjourned, at least if the letters "Ad," a third uncertain letter and another "d" stand for "adjourned," which they may possibly do. But unless those letters do import "adjourned," I do not know what they import. Certainly they do not import "settled," which is written in letters at length in pencil against some of the names. It is said with regard to Mr. *Underwood*, that the difficulty is cured by a different entry in another part of the paper in the Master's office, by which it appears that he was decided to be a contributory. That, however, in my judgment, would not make this such a recorded list of contributories as the act of parliament requires, or such a list as it would be safe to act upon. But there is another observation. The case of Mr. *Reginald Riddell* stands "adjourned," if the letters I have mentioned mean "adjourned." Now I believe it to be competent to the Master, notwithstanding an adjournment of a question whether a particular individual shall not or shall be treated as a contributory, to make a call on those who certainly are contributories; but I apprehend that in such a case, convenience and justice require that the Master should exhaust, if he reasonably can, the case as to that alleged contributory before making the call. If from any circumstance it cannot be done without considerable delay, that may form a reason why a call should be made on the others in a state of uncertainty whether the suspended individual is or is not a contributory. But here no explanation is given of that circumstance, and it is consistent with all that has been brought before us that the case of Mr. *Reginald Riddell* might have been disposed of. For these reasons, although, as I have already said, if the winding-up order is to stand, it is certain, or almost certain, that some call must be made,
 I think

I think that the rules of the Court, the demands of justice, and the interests of society, require that the list of contributories before us should not be treated as a record—should not be treated as what the act of parliament requires. Accordingly, upon this ground, I think (and I believe it to be the opinion of my learned brother also), that the portion of Mr. *Underwood's* demand upon the Court which consists of an application to have the call discharged, should be acceded to. His motions before the Vice-Chancellor will be refused in all other respects. It is my opinion, and I believe the opinion of both of us, that Mr. *Underwood* should have no costs of these applications, but should pay the costs of those persons who were parties to the compromise, and whose compromise he sought to discharge, and that the costs of the official manager and the other parties to the motions should be paid out of the estate. This, I believe, exhausts the whole subject.

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The LORD JUSTICE TURNER.

This is a motion to discharge an order made by the Vice-Chancellor on two motions which were before him on the part of Mr. *Underwood*, a contributory or alleged contributory of this Company. Those motions were, as to one of them, to discharge a call which had been made upon the contributories of the Company, including Mr. *Underwood*; and, as to the other of them, to strike Mr. *Underwood's* name out of the list of contributories; or, in the event of his name being left upon the list, to set aside a compromise entered into by the Official Manager, under the sanction of the Master, with five other contributories of the Company. The order first made by the Vice-Chancellor upon the motions was, that the notices of motion should be served on all the contributories,

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contributories, and (as I understand) all the creditors of the Company, and upon the motion coming on after the service had been effected, his Honor's order was, that it appearing to the Court that the Company never was formed, that it never transacted any business as a Company, that it never contracted any debts as a Company, and that there were no affairs which had been or could be wound up pursuant to the order for the winding up of the 25th of *January* 1850, the call should be discharged and all proceedings under the order to wind up of the 25th of *January* 1850 be stayed, except that the Official Manager and any person interested was to be at liberty to apply to the Master or to the Court, as he might be advised.

There are two questions therefore upon the motion before us, first, whether the order made by the Vice-Chancellor ought to be upheld; and secondly, if that order ought not to be maintained, whether Mr. *Underwood* is entitled to have his name struck off the list, or to discharge the call or to set aside the compromise.

Now the order of the Vice-Chancellor not only discharges the order for the call, but stays all proceedings under the order to wind up of the 25th of *January* 1850—A similar order was made by the Vice-Chancellor in the matter of the *Dover and Deal* Railway Company, and on an appeal from that order, we held that it ought not to have been made (a). The order in the present case seems to me, I confess, to be at variance with that decision. I need hardly say, however, that if we were now satisfied that the order which has been made in the present

(a) *Carver's Case*, ante, p. 94.

present case, and which was made in the *Dover* and *Deal* case, was a right order, we should not for a moment hesitate to adopt a different course from that which we previously adopted. It becomes necessary, therefore, to consider the ground upon which the order of the Vice-Chancellor in the *Dover* and *Deal* case and in the present case was rested. The two cases, as I understand them, are the same in principle; and the distinction between them, so far as I am aware, and so far as was pointed out at the bar, appears to be only this, that, in the *Dover* and *Deal* case, creditors who had come in under the order had not been served, and that, in the present case, the creditors who have come in under the order have been served. Now the grounds upon which this order rests, and upon which I presume the order in the *Dover* and *Deal* case rested, are extremely well explained by the preface to the order. That preface states the grounds to be, first, that the Company was never formed; secondly, that it never transacted any business as a Company; thirdly, that it never contracted any debts as a Company; and, fourthly, that there are no affairs which have been or can be wound up pursuant to the winding-up order of the 25th *January* 1850. It will be well to examine these grounds separately.

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With reference to the first of these grounds, that the Company was never formed, it is perfectly true the Company never was formed as a Company; it never existed as a Company, but it existed as an association to form a Company, and the legislature (whether wisely or not is not for this Court to consider) has said, and the House of Lords has held the legislature to have said, that these associations to form Companies are within the meaning of the Winding-up Acts, subject to the discretion of the Court, as to applying the machinery

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provided by the act for the purpose of winding them up— It cannot therefore be said, that because this association did not form a Company within the strict terms of the definition of the word "Company," as generally understood, that it was not therefore a Company within the meaning of the acts.

Very great evils have undoubtedly arisen from the enactments, and the application of them to half-formed Companies has unquestionably been productive of great inconvenience and mischief. It may perhaps be true, that the acts have been too indiscriminately applied to these half-formed Companies, but it is one thing to say that the act is mischievous and that the application of the act has been unwise, and another to say that a power of applying the act does not exist. The other grounds which are stated in the preface of this order are these— that there has been no business of this Company, no debts contracted by the Company as a Company, and no affairs of the Company to be wound up; but it is perfectly clear, that there were funds subscribed for the purposes of the association, that there was business of that association transacted, and that there were debts, for some of which some of the members and for others of which others of the members were liable. There have been also in this case moneys contributed by different subscribers to the association, for the purpose of paying those debts, and those moneys have been contributed in unequal proportions. It has not been suggested that in respect of those payments, either originally made by the subscribers to the association or subsequently made by different members of the association in payment of debts contracted by some of them for the purposes of the association, there is not a right of contribution existing between all or some of the different subscribers to the association. I do not see, therefore, how it can be said  
 that

that there are no affairs to be wound up, especially when it is remembered, that the main purpose of this act of parliament was not the payment of the debts of the association, but the working out the rights of contribution, and the removal of the difficulties which existed in proceeding to enforce those rights where large bodies of persons were concerned, and where, according to the existing rules of Courts of Equity, it was necessary that all those persons should be parties to the suit. If the act of parliament had in view the payment of debts, I take it to have had that object in view as a subsidiary purpose to the purpose of contribution. It seems to me that the order which has been made by the Vice-Chancellor, so far as it stays the proceedings under the order to wind up of the 25th of *January* 1850, with liberty to the official manager and other parties to apply, cannot stand upon the grounds by which that order is prefaced.

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It was said, however, on the part of the Respondent, that whatever grounds might have existed for the winding-up order of the 25th of *January* 1850, at the time when the order was pronounced, it is now clear from the evidence, that the order was improperly obtained, that it was not a *bonâ fide* order for winding up the Company: and the nature of the case which is made on the part of Mr. *Underwood* upon this point is,—that Mr. *Causton*, the secretary of the Company, set up a claim in respect of a debt which he alleged to be due to him from the Company, that he induced the petitioners, each of whom had paid I think a sum of 300*l.* towards the payment of the debts of this Company, to apply for the winding-up order. In short, that the whole proceeding under the winding-up order has been a scheme on the part of the secretary and of the solicitor to enforce on the part of the secretary an unfounded claim, and to create on the

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part of the solicitor the enormous costs which have arisen from this litigation. It was said, that whether the winding-up order was right in its inception or not, it became under these circumstances the duty of this Court to stay the proceedings under the order. But if the winding-up order was improperly obtained, surely the right course was to apply to the Court to discharge it, and not to stay the proceedings under it. The winding-up order is in the nature of a decree, under which the rights of all the contributories are to be worked out; and from the moment that the order was made, each of those parties acquired and had an interest under that order. It is not, I think, according to the course of this Court to stay proceedings under a decree or order, without the express consent of all the parties who are interested under it, and have acquired rights which are consequent upon it.

It was, however, said that this was a technical view of the case, and that the order itself was founded upon substantial justice. I have observed of late a growing practice, when deviations are attempted to be made from the ordinary course of the Court, to treat the rules of the Court as being merely technical. But by anybody, who examines into this subject, it will be found that the technicalities of Courts of justice are very often founded upon and devised for the express purpose of promoting substantial justice; and if ever there existed a case in which substantial justice would be best promoted by observing the technical rules of the Court, it is the case which is now under our consideration. Supposing Mr. *Underwood's* case to be wholly right, this has been a scheme on the part of the secretary and of the solicitor of the Company to create litigation for their own benefit. If this be so, upon whom ought the costs of the litigation to fall? Undoubtedly upon the solicitor

r by whom these proceedings have been advised. is that solicitor to be reached? What rights have contributories of this Company against that solicitor? If the proceedings are stayed under this order, there are no means of reaching the person who, in the present case, ought to be made responsible for those proceedings, whereas if the ordinary and regular course of the law is to be adopted, and application is made to have the order discharged, the persons who have been induced by the solicitor to apply for the order will be responsible for the costs, and the solicitors by whom the scheme has been devised will be responsible for the persons whom they advised to institute the proceedings. But if the practice of the Court is deviated from, as it is in the present order, the solicitors will be exempt from any such liability to their own client, and will have brought their own client to the other parties involved. It seems to me, therefore, that if ever there was a case in which substantial justice required the ordinary course of the Court to be pursued, it is the present case before us.

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was lastly attempted to maintain the substantial effect of this order by saying, that the order itself related to the official manager and the other parties, liberty only. But as I conceive, where a party has acquired property under a decree or order, it is not for this Court to deprive him from prosecuting that right which he has acquired, except upon special application and under special circumstances. He has the right, and, unless he consents, or under special provisions, that right is not to be taken from him; and that brings me to the present consideration with respect to this order.

The applications which were before the Vice-Chancellor were applications to remove the name of Mr. Underwood

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*Underwood* from the list of contributories, to discharge the call, and to set aside the compromise. There was no application before the Court to stay the proceedings under the winding-up order, and those who had become parties to the winding-up order in the course of the proceedings under it, but who did not appear upon the motion before the Vice-Chancellor had, or, at all events, might have, as was pointed out in the argument, very important rights. They might have the right of throwing upon other members of the Company the whole amount which they had paid in respect of the liabilities of the Company; they might be in a condition to show that there was a primary liability attaching upon other members of the Company, which rendered those other members liable to them for the moneys which they had contributed towards payment of the liabilities of the Company, and they were justified in relying and entitled to rely upon the Court not going beyond the matter that was before it upon these motions. I think that the Court could not, as against them, be justified in affecting their rights. And upon all these grounds, with the greatest respect for the judgment of the Vice-Chancellor, my opinion in this case is (as it was in the *Dover and Deal* case), that the order cannot be maintained.

I have said nothing as to discharging the order for winding up. It would not be proper to say much upon that subject, as it is not an application now before us for our consideration, but, from what has passed upon the subject, I think it right to add, that whoever may be inclined to move the Court for that purpose will do well, before he takes that step, to consider how that application may be affected by the delay, and by the long continuance of the proceedings which have been had under the order. Upon the question whether there may be a case, which may entitle him to discharge that order—either the case  
 which

which originally existed, or a case which can be now brought forward—I do not of course give any opinion whatever; but it is obvious that a case may have existed, in the first instance, which may not exist now, in consequence of the length to which the proceedings have gone under the order.

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The order not standing in its present form, it becomes necessary now to consider the questions, as they stand upon the motions on the part of Mr. *Underwood* before the Court. And, first, with reference to the application to strike Mr. *Underwood's* name off the list, Mr. *Underwood* undoubtedly was a subscriber to this Company; he had a right, as a subscriber, to be upon the list of contributories, because he might be in a position to show, that he was entitled to have some portion, either of the moneys which were originally subscribed by him, or of the moneys which he had paid towards the liabilities of the Company repaid to him. In the month of *January* 1851, he submitted to be put upon the list of contributories. It does not follow that because a man is put upon the list of contributories, he is put there for the purpose of charging him with a liability. It may be, that he is there for the purpose of having a right which exists in him enforced for his benefit against other persons who may be contributories to the Company. Now it is said that Mr. *Underwood* submitted to be put upon the list, upon the ground that, according to the law as it then stood, there were circumstances which would be sufficient to make him liable as a contributory of the Company. But the law on the subject was settled at no very remote period after that time; and, after the law was thus settled, other contributories, who seem to have been in the same position as Mr. *Underwood*, moved that their names might be struck off the list. No such motion was made on the part of Mr. *Underwood*. A call was made in  
*June*



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*June 1852.* Some of the parties appealed against the call. No complaint was made by Mr. *Underwood*, and it appears to have been stated on Mr. *Underwood's* behalf, that he was upon the list with a view to receiving back part of the 150*l.*, which he had advanced for payment of the liabilities of the Company. Under these circumstances, I think that, whatever might have been the rights of Mr. *Underwood*, if he had come promptly with the other contributories to have his name taken off the list, he is not now in a position to ask the Court for that relief. He cannot remain upon the list so long as he thinks it will be for his benefit to continue there, and then come to this Court and apply to be discharged when he begins to apprehend it will be to his prejudice. He must, in my judgment, be taken to have elected to remain upon the list of contributories; and I feel no doubt, therefore, that the application on his part, so far as it goes to his name being struck off the list of contributories, cannot be granted.

Then we come to the question as to the call. Now with reference to the call, it is a call for costs, and, on looking at the proceedings (so far as Mr. *Craig* brought them under our consideration), I see no reason to think that any of the costs which have been incurred were not costs properly incurred for the purpose of winding up this concern. The order was made in 1850, and Mr. *Craig* stated the fact that down to *June 1852*, the time was occupied in settling the list of contributories of this Company; and if the costs that have been incurred were costs incidental to the settlement of the list of contributories, or incidental to the applications to the Court for the discharge or putting on of persons upon that list, they are costs necessarily incurred in the winding up of the Company for the benefit of those who are contributories of the Company. If, therefore, there had been in the present

case

case a regular list of contributories settled, I should not (speaking for myself alone) have been inclined to disturb this call. But what appears to me to be a fatal objection to the call is, that which has been pointed out by my learned brother. I think that there is no such list as was contemplated by the act of parliament. When we look at what is said to have been the list of contributories, we find it consisting of a list of persons, against some of whose names is put the word "settled," and against others "adjourned," and against the very name of Mr. *Underwood* himself stands the word "adjourned;" and it was only towards the end of the argument that our attention was called to another part of the proceedings, where there is a note made by another Master in these words, "*Underwood* settled." I do not think that this is the sort of list which the legislature contemplated. I think the meaning of the act was, that there should be a list regularly made out and settled by the Master, of those who are to be made liable for the debts of the Company, and for contributions between themselves. This is a matter which may, perhaps, be very easily set right, but I think that this Court is not called upon to go through all the proceedings of the winding up for the purpose of ascertaining who are and who are not contributories to this Company.

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The only remaining question is that relating to the compromise.

Some objections of form have been argued, but according to the act of parliament, the Court is not bound to reverse any proceeding under it, on the ground of formal defects. What is to be looked at is the substantial justice of the case. Now this compromise being ultimately concluded in *November* 1853, the official manager received the money, and therefore there is an assent distinctly

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tinctly on his part to the compromise, and there is distinct evidence, that the Master approved of that compromise. Perhaps that might not be sufficient, if the compromise were shown to be unjust to the other parties who were concerned in the transaction. But how does this case stand upon the evidence? The amount of the debts is under 300*l.*, I think, and the costs which are to be provided for are stated to be 536*l.*; and there are, I think, admitted contributories to the number of seventeen, or some such number, able to pay. The sum paid by these gentlemen was 120*l.*, so that these five persons have contributed 600*l.* towards the payment of claims which, upon the evidence before us, amount to 836*l.*

The case does not even rest there, for this Respondent had the opportunity unquestionably as early as *November* 1853 to have brought this matter forward. A question has been raised, whether it should have been re-heard before the Master. Upon the evidence before us I think that Mr. *Underwood* had full opportunity of having it re-heard before the Master. Whether he had or had not the opportunity of doing so, he undoubtedly had the power of coming to this Court as early as *November* 1853, to discharge the order for a compromise. No such application was made; and I think that where an arrangement of this description is entered into between the official manager and the other contributories, it is of the essence of justice that any one who means to complain of that arrangement should instantly apply to the Court for the purpose of disturbing it: and for this reason, that, when such a compromise has been made, the parties who have effected it cease to be parties to the proceedings, and their interests become unrepresented before the Master. They have no right to be before him either individually or by representation. Everything, therefore, that takes place after the compromise is effected, and  
 before

before the application is made to the Court to disturb it, or before the order is made for setting aside the compromise, is a matter done entirely behind the backs of the parties. I think that a person who has notice of a compromise having been made has no right to put other persons in that position. Beyond that, I think it is most important that these arrangements made in the Master's office, with the knowledge of the parties who are interested in them, should not be disturbed except upon solid and substantial grounds.

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With reference to the costs, I concur entirely in what my learned brother said, and am of opinion that Mr. *Underwood* must pay the costs of the parties to the compromise; that the parties who were required to be brought by the order of the Vice-Chancellor before the Court must have their costs out of the estate, and the official manager also; and that Mr. *Underwood* should have no costs of the proceedings.

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FREEMAN v. FREEMAN.

July 19, 24.

Before The  
Lords Jus-  
tices.

The expres-  
sion "This is  
my last will  
and testa-  
ment" does  
not operate as  
a revocation of  
a former will,  
without words  
to that effect,  
as regards  
real estate.

THIS was an appeal from a decision of Vice-Chancellor *Wood*, holding, that a will expressly devising copyhold estates was not revoked, as to those estates, by a subsequent will.

The case is reported in *Mr. Kay's Reports (a)*, and the material facts with reference to the appeal were the following:—

The testator *Thomas Freeman* was, at the time of making each of the wills, entitled, upon the death and failure of issue of his brother, to the reversion in fee of certain copyhold hereditaments, holden of the manor of *Bromyard*, but which he never surrendered to the use of either will. He was also entitled to certain freehold hereditaments in fee simple in possession.

The earlier will was dated the 18th of *June 1804*, and was executed and attested as the law then required in order to pass freehold estates by devise. After directing that all the testator's just debts and funeral expenses, and the expenses of proving that his will, should be paid and discharged by his executrix and executors therein-after named, and charging his estate and effects with the payment thereof, the will proceeded as follows:—"I give, devise and bequeath unto my wife *Elizabeth Freeman*, for her life, in case she shall not marry again, subject as hereinafter mentioned, all the estate, right, title

title and interest which I have of, in or to all and every or any of the freehold, leasehold and copyhold estates given and devised by the will of my late father to my brother *Edward Freeman*, with remainder or reversion to the right heirs of my said late father, in default or failure of issue of my said brother *Edward*, and also all and every other estate and estates, whatsoever and where-soever, freehold, leasehold, or copyhold, and to which I have any right or title whatsoever, in possession, reversion, remainder or expectancy, to hold to my said wife and her assigns for her life; subject to and I do hereby subject and charge the said premises, and every part thereof so as aforesaid given to my said wife, with the breeding up, maintaining and educating of my two younger sons, *Thomas Dew Freeman* and *John Freeman*, and my daughter *Eliza Freeman*; and from and immediately after the decease or second marriage of my said wife, which shall first happen, I give, devise and bequeath all the aforesaid messuages, tenements, lands, estates and premises unto my said two younger sons, *Thomas Dew Freeman* and *John Freeman*, and my daughter *Eliza Freeman*, their heirs, executors, administrators and assigns for ever." The will also contained the following clause:—"And whereas my eldest son *Edward Bellingham* being well provided for by the will of my father, I give him by this my will the sum of 10*l.* only, by way of acknowledgment;" and the testator thereby appointed his wife *Elizabeth Freeman*, his brother *Edward*, and his cousin *Richard Barneby*, joint executrix and executors of that his will.

The subsequent will was dated the 25th of *August* 1807, and was similarly executed and attested. It was as follows:—"This is the last will and testament of me *Thomas Freeman*, of the *Whitehouse*, in the parish of *Suchley*, and county of *Worcester*, gentleman: whereas,  
in

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in and by the will of my late father, *Thomas Freeman*, deceased, my eldest son, *Edward Bellingham Freeman*, will become, upon my decease, entitled to all my freehold estates, which will make an ample provision for him: Now I do hereby give and bequeath to my wife *Elizabeth Freeman*, for and during the term of her natural life, all and singular the stock, crop and effects, both real and personal estates, of what nature or kind soever, and from and after her decease, I leave and bequeath all my crop, property, personal estates and effects, of what nature or kind soever, and from and after her decease I do give and bequeath all and every my child or children (except the said *Edward Bellingham*), who shall or may be living at the time of my decease, to be equally divided between them, share and share alike; and I make, nominate, declare and appoint my wife sole executrix of this my will. In witness whereof I have hereunto set my hand and seal, the 25th of August 1807. *Thomas Freeman*."

The testator died in *September 1807*. He left him surviving his widow and *Edward Bellingham Freeman*, who was his eldest son and heir-at-law, and also his heir according to the custom of the manor of *Bromyard*. His three younger children, *Thomas Dew Freeman*, *John Freeman* and *Eliza Freeman*, and with two other children named *Louisa Freeman* and *Mary Ann Freeman* (who were both born after the date and execution of the earlier will), also survived him.

The testator's widow died in 1827, and his brother, *Edward Freeman*, died in *October 1851*, without leaving issue.

The plaintiffs in the present suit were *Thomas Dew Freeman*, and persons claiming under others of the testator's

tator's younger children; and the defendants were persons claiming under the customary heir, and some of the younger children.

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The bill sought to have the want of a surrender of the copyhold premises to the use of the testator's will supplied, and an injunction to restrain proceedings in ejectment, which were in the course of prosecution by the persons claiming under the customary heir.

The Vice-Chancellor decided in favour of the Plaintiffs. The Defendants claiming under the customary heir appealed.

Mr. *W. M. James* and Mr. *Metcalf*, for the Plaintiffs, and Mr. *Rolt* and Mr. *Hislop Clarke*, for Defendants in the same interest.

The expression, "This is the last will," only imports that it is the last will in point of date, not that it revokes a former, except so far as it does so expressly or by implication, as where it is to any extent inconsistent with it. In *Thomas v. Evans* (a), Lord *Ellenborough* said, "It is not enough to say that by making this will, in terms large enough to include all his property, he must, therefore, have meant to revoke the former will, unless it can be shown that he has made a disposition of the same property inconsistent with it." Here there is no inconsistency, for the testator had freehold estates when he made the second will, and, consequently, that will would not pass copyholds in the then state of the law, there having been no surrender.

They referred to *Church v. Mundy* (b); *Wentworth*  
v.

(a) 2 *East*, 488—494.

(b) 15 *Ves.* 396.



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v. *Cox* (a); *Allen v. Anderson* (b); *Judd v. Pratt* (c);  
*Byas v. Byas* (d); *Sampson v. Sampson* (e); *Stoddart*  
v. *Grant* (f); *Coward v. Marshal* (g); *Doe v. Long-*  
*lands* (h), and *Hitchins v. Basset* (i).

Mr. *Chandless* and Mr. *Berkeley*, for the Appellants.

The second instrument not only contains the words, "This is the last will and testament of me;" but it also purports to dispose of all the testator's real estate. This is a revocation of the former will; *Plenty v. West* (k). The introductory words, declaring the second will to be the last will and testament, are sufficient to revoke all former wills without any further declaration, and the addition of express words to that effect is mere surplusage of modern introduction. In *Madox's* *Formulare Anglicanum* there are Wills, extending from the tenth century to the sixteenth, but there is not one containing any such express declaration, and it has never been held necessary. A second will is not to be taken as a codicil to the former, unless it is so expressed. In *Crosbie v. M'Doual* (l), Sir *Richard Arden* said, "There is a great distinction between wills and codicils in this respect. If there are two separate papers, both called wills, inconsistent with each other, it is not the rule to prove both in the Ecclesiastical Court. The last is the will. From the nature of the instrument it revokes the other. If the last purports to be the whole will, they do not, I conceive, prove both. Unless there is something to show it was meant to be coupled with another instrument, it is not to be taken to be a codicil."

They

- (a) 6 *Madd.* 363.
- (b) 5 *Hare*, 163.
- (c) 15 *Ves.* 390.
- (d) 2 *Ves. sen.* 164.
- (e) 2 *Ves. & B.* 337.
- (f) 1 *Mucqueen*, 163.

- (g) *Cro. Elis.* 721.
- (h) 14 *East*, 370.
- (i) 2 *Salk.* 592.
- (k) 16 *Beav.* 173.
- (l) 4 *Ves.* 610.

They also referred to *Willet v. Sandford* (a); *Archer v. Slater* (b); *Maxwell v. Maxwell* (c); *Seymour v. Northwotly* (d).

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Mr. James, in reply, was stopped by the Court.

*The* LORD JUSTICE KNIGHT BRUCE.

It is conceded in this case on the part of each of the Plaintiffs and Defendants, that the copyhold estate in dispute is the only copyhold property that the testator *Thomas Freeman* the son had or was interested in;—that he never surrendered any copyhold property to the use of his will—that his customary heir was sufficiently provided for independently of copyhold property—that the testator when he executed the second of the two testamentary instruments in question had a freehold estate held by him in fee simple devisable and devised by it—that accordingly if it had been his only testamentary instrument, not one of the Respondents would have any title or claim to the copyhold property in dispute, or any interest in any part of it; and that, on the other hand, if the earlier had been his only testamentary instrument, the equitable title to the copyhold property would clearly not be as the Appellants contend. The controversy to be determined, therefore, is, whether the testator died intestate as to this property; for, if he did not, the equitable title to it became, upon his death, governed by the earlier of the two testamentary instruments. But the testator did not die intestate as to his copyhold property, unless the earlier was revoked by the later of the two instruments, at least as to that property. The later instrument, however, does not profess

(a) 1 Ves. sen. 186.

(c) 2 De G., M. & G. 705.

(b) 10 Sim. 624.

(d) *Hardress*, 374.

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profess or purport to revoke, nor does it notice any other testamentary disposition of the testator or give or affect any part of his copyhold property. It may be true, that the second testamentary instrument disposes of some, or the whole, of his other disposable property, in a manner differing materially from the intention of the earlier instrument, but (I repeat) the later instrument ~~does not~~ devise or affect—does not profess to devise or to affect—the copyhold estate or any part of it. Both instruments, then, as it seems to me, may well stand in force as containing together all the testator's testamentary dispositions, those contained in the later paper superseding of course, so far, but only so far, as they contradict or depart from, those contained in the earlier document; for the mere circumstance that, in the later instrument, he calls it his last will and testament, and uses the expression "this my will," amounts, in my opinion, to nothing, so far at least as real estate is concerned. That is to say, I consider that, for every present purpose at least, it cannot be read or construed otherwise than it would have been right to read and construe it, if instead of using the words "the last will and testament" he had said "a testamentary instrument," and instead of saying "sole executrix of this my will" he had said "my sole executrix."

If he had begun it with the words "This is my only will" it might have been open to different considerations. But, I repeat, whatever may be the view of the Ecclesiastical Courts, I do not think a temporal Court bound to say that when a man in an instrument containing testamentary dispositions by him, describes it as his last will and testament and otherwise calls it his will, he is to be taken *primâ facie* as meaning wholly to annul any former testamentary instrument made by him.

him extending to matters to which the later does not extend.

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It appears to me that the Appellants have no ground for complaining of the decree, and that their petition of appeal ought to be dismissed with costs.

*The* LORD JUSTICE TURNER.

The question is whether the subsequent will operates as a revocation of the prior one, the former unquestionably pointing to copyholds, the latter not in any manner pointing to that description of property. No case has been cited where a distinct property having been given by a first will, the disposition of it has been revoked by another will making no reference to that property. I am not inclined to extend the principle of the decisions for the purpose of creating an intestacy, which would, in this case, be the consequence of the extension.

It is not necessary to say what indication of intention to dispose of property by a subsequent will may be sufficient to effect a revocation of an earlier testamentary disposition, although no effectual disposition of the property may be contained in the later document. That is not here the question. The testator, in this case, must be taken to have known when he made the second will that he had disposed of the property in question by the first. It is said, however, that the law of the Ecclesiastical Courts is different, but the principle on which those Courts act may be explained by the circumstance that they regard the appointment of the executor as disposing of the whole of the personal estate. That principle has never been applied to real estate in this country, and by deciding in favour of the Appellants we should be extending it to a case to which, in my judgment, it ought not to be extended. Those who represent the heir ought

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not, I think, to have brought the action of ejectment, and had the case come originally before me, I should have thought that they ought to have suffered the consequences of having done so; but the Vice-Chancellor has dealt more mercifully with them, and I will not depart from his decision. They must, however, pay the costs of this appeal.

July 24, 25.  
August 1.

*Before The  
Lords Jus-  
tices.*

The Dower  
Act does not  
apply to free-  
bench.

The pur-  
chaser of a  
copyhold held  
of a manor,  
the custom of  
which entitled  
widows of the  
copyholders to  
freebench in  
one moiety of  
the lands of  
which their  
husbands died  
seised, took a  
surrender, but  
died before ad-  
mittance:—  
*Held*, that his  
widow was  
not entitled to  
freebench at  
Law or in  
Equity.

## SMITH v. ADAMS.

THIS was an appeal from a decision of the Master of the Rolls, holding, that the widow of an unadmitted surrenderee of copyholds had an equitable title to freebench. The case is reported below in the 18th volume of Mr. *Beavan's Reports* (a).

The following statement of the facts, which is transposed to this place from the judgment of Lord Justice *Turner*, will be sufficient for this report.

By the custom of the manor of *Weedon Beck*, in the county of *Northampton*, the widow of a copyhold tenant is entitled, for her freebench, to an estate for life in one moiety of the copyhold tenements of which her husband died seised. In the year 1845, *Samuel Baseley* was seised of some copyhold tenements holden of the manor, subject to the life estate of *Ann Baseley* (who was the widow of a prior owner, and as such entitled to freebench), in a moiety thereof; and in the month of *July* 1845, *Samuel Baseley* sold the copyhold tenements of which he was seised to *George Smith*, subject to the estate of *Ann*. *Samuel Baseley* at this time stood admitted to these copyhold tenements, and, upon the com-

pletion

(a) Page 499.

pletion of the sale, he and his wife surrendered them out of Court, to the use of *George Smith*, his heirs and assigns, according to the custom of the manor. This surrender was duly presented; but no admission was then, or had at any time since been taken upon it. *George Smith*, however, entered into possession of the surrendered copyholds. He died on the 22nd of *February* 1851, leaving both *Samuel Baseley* and *Ann Baseley* surviving him, and he left the Appellant *John Smith* his heir, according to the custom of the manor, and the Respondent *Maria Smith* his widow. In this state of circumstances, the Respondent *Maria Smith* claimed to be entitled to freebench of the entirety of the copyhold tenements; and the question having been brought before the Master of the Rolls, he decided that she was not entitled to freebench in respect of the moiety of the tenements to which *Ann Baseley* was entitled for life; but as to the other moiety of the tenements, he declared, that the Defendant (the heir) was, until admittance, a trustee of the rents and profits of one half of such undivided moiety for the benefit of the widow, and directed him to account for such rents and profits, from the time of his taking possession thereof, and that upon the heir being admitted, the widow would become entitled to her freebench out of the said copyhold messuage and closes.

*Maria Smith*, the widow, did not appeal from this decision so far as it was unfavourable to her, as to the moiety of *Ann Baseley*; but *John Smith*, the heir, appealed from the decision as to the other moiety.

Mr. *Lee* and Mr. *H. Wright*, for the Appellant.

The Dower Act does not apply to copyholds. The Master of the Rolls expressed his opinion in our favour in that respect. Copyholds are expressly mentioned in the Act  
to

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to amend the Law of Inheritance, and from their not being mentioned in the Dower Act, it must be inferred that they were not intended to be included in it. This inference is rendered conclusive by reference to the Report of the Real Property Commissioners, on which the Dower Act was founded. Considering then the question as unaffected by the act, it was necessary, according to the custom, in order to entitle the widow to freebench, that her husband should have died seised of the copyholds. Now seisin must mean legal tenancy. This there could not be before admittance, which is, to use the expression of Lord *Coke*, "the life and perfection of the copyholder's estate." The title of a widow to freebench is a mere legal title, and to establish her right she must bring herself within the custom. Up to the admittance of the surrenderee, the surrenderor is tenant. The relation of admittance to the surrender on which the Respondent relies does not extend beyond a death. The argument on the part of the Respondent assumes the contrary, and it must have been on this fallacious assumption, that the decision appealed from proceeded. The Master of the Rolls founded his judgment upon that of Lord *Mansfield* in *Vaughan v. Atkins* (a), where it was said that the surrender was the substantial part of the conveyance of copyhold lands, and the admittance merely the form which completed it, and that, therefore, the admittance would have its operation by relation back to the date of the surrender. His Honor observed, that *Vaughan v. Atkins* was not disputed by the counsel for the Appellant. Now it was not necessary for them to dispute the authority of that case, because there the heir of the surrenderee had been admitted, and Lord *Mansfield's* reasoning in his judgment proceeds on the admittance having relation back to the surrender. If, however,

(a) 5 Burr. 2764.

ever, *Vaughan v. Atkins* should be considered applicable to the present case, then we say, that it was not correctly decided, because it contradicted a fact by a fiction; and although fictions of law may be adduced to support facts, they cannot be used to alter, lessen or contravene them. In *Rex v. Mildmay* (a), *Vaughan v. Atkins* was much relied on among other cases, and *Littledale, J.*, said, that he did not consider the cases cited as of much weight.

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They also referred to *Forder v. Wade* (b); *Selwyn v. Selwyn* (c); *Dixon v. Saville* (d); *Lucas v. Comberford* (e); *Rex v. Rennett* (f); *Gale v. Gale* (g); *Edwards v. Champion* (h); *Parke on Dower*, p. 30; *Co. Litt.* 59 b; *Sir W. D. Evans' General View of the Decisions of Lord Mansfield* (i).

Mr. Swanston and Mr. Jolliffe, for the Respondent.

The Master of the Rolls thought, that the heir could not avail himself of the principle of relation for one purpose, that of coming in as heir, and refuse to give effect to it as regards the right of the widow to freebench. If the heir had applied for admittance generally, that admittance would have related back to the surrender for all purposes. *Vaughan v. Atkins* (h) is decisive as to this. That case has never been overruled. *Rex v. Mildmay* (l) merely decided, that admission has no effect beyond, but was defined, as to its extent, by the terms of the surrender. The husband was fully seised as against every one but the lord. In some manors, freebench extends to the entirety of the land. If that had been so here, the widow would have been entitled to admission,

(a) 5 B. & Ad. 254.

(b) 4 Bro. C. C. 521.

(c) 2 Burr. 1131; 1 Wm. Black. 222 and 251.

(d) 1 Bro. C. C. 326.

(e) 3 Bro. C. C. 166.

(f) 2 T. R. 197.

(g) 2 Cor, 136.

(h) 2 De G., M. & G. 202.

(i) Page 187.

(k) 5 Burr. 2764.

(l) 5 B. & Ad. 254.



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admission, and her admission would have related back to the surrender. It can make no difference in principle, that the freebench is here confined to a moiety of the land.

They referred to 4 Co. 29 a; *Holdfast v. Clapham* (a); *Right v. Banks* (b); *Doe d. Bennington v. Hall* (c); *King v. Turner* (d); 1 *Roper's Husband and Wife*, 352; 1 *Scriven on Copyholds* (4th Edit.), 72, and *Sugden on Real Property Statutes*, 261.

Mr. Lee, in reply, referred to *Perrin v. Blake* (e).

[In the course of the argument the *Lords Justices* referred to *Bacon's Abridgment*, title "Bargain and Sale (E)," p. 471, where it is said,—“ So if a man bargains and sells lands by indenture, and then takes a wife and dies; and, after, the deed is enrolled, the wife shall not be endowed;” citing in the margin *And.* 161; *Cro. Car.* 569. Their Lordships said that they could not admit that proposition to be law, although laid down in a work entitled to great respect, and that the authorities cited did not support it. At the conclusion of the argument judgment was reserved.]

August 1.

The LORD JUSTICE KNIGHT BRUCE.

The argument upon this appeal was so conducted, that, notwithstanding the frame of the bill and the language of the answer of the Defendant *John Smith* (the Appellant), I assumed then, and still assume, all parties to have been well content that the decree under appeal should not extend to any other subject than the claim of the Plaintiff to freebench in the tenements comprised in the surrender and deed dated respectively the 14th of July,

(a) 1 T. R. 600.

(b) 3 B. & Ad. 664.

(c) 16 East, 208.

(d) 1 Myl. & K. 456.

(e) 4 Burr. 2579.

July 1845 (of which there are among the papers what I understand to be admitted copies), nor do I suppose that any one of the parties wishes our attention to be addressed to any thing else. This I mention, because, on the face of the pleadings, it would seem that the decree ought to have extended to other matters.

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I shall confine myself, however, as I have intimated, to the question whether legally or equitably the Plaintiff, as the widow of *George Smith*, is entitled to freebench in the tenements comprised in the surrender and deed that I have mentioned, a question which (to omit *Ann Baseley* now dead, and the debts, now, as I collect, paid off, omissions that do no injustice to the Plaintiff) may be thus stated, namely, whether where a copyholder, seised of tenements, to him and his heirs, at the will of the Lord, according to the custom of the manor, has sold them, and having received the whole or the greater part of the purchase-money, has surrendered them to the use of the purchaser and his heirs, in the manner usual on a completed purchase of copyhold property, and the surrender having been duly entered on the rolls, and the purchaser having taken possession of the tenements, the purchaser, without having been admitted (and therefore while the seller remains in fact tenant on the rolls), dies, upon which event the customary heir of the purchaser enters as heir into possession of the tenements, and remains in that character in possession of them, but has not been admitted, nor has demanded or sought to be admitted to them,—the widow of the purchaser is legally or equitably entitled to freebench against the heir? it being clear and conceded that if her husband had been admitted under the surrender in his favour, she would have been entitled to freebench.

The affirmative of this proposition, so far at least as equitable

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equitable title is concerned, was decided in the cause at the Rolls thus—[His Lordship read the decree under appeal.]

With this decree the Plaintiff, the widow, is satisfied; the Appellant being the Defendant *John Smith*, the customary heir, who so far as the question that I have stated is concerned denies her right at law equally and here. The cause forms no exception from what may seem of late to have been the general rule of the Court of Chancery in copyhold cases, namely, that there should be a judicial difference of opinion; nor can it be matter of surprise that various views should often be taken of some of the strange and uncouth relics of those habits and manners which produced copyhold tenure; a tenure, that, I trust, under the operation of a recent statute, for the practical and useful nature of which we are I believe mainly indebted to the present Lord Chancellor, will, ere long, lie buried with a cognate, though greater and more famous, oppressor, the tenure in chivalry. In the meantime, as every thing has its use, we may be content to consider an occasional controversy upon copyholds to have some value as a remembrancer of our still imperfect civilization.

The opinion of my learned brother and myself continues to be that the Dower Act, the statute 3 & 4 *Will.* 4, c. 105, does not extend to such a case as the present or affect it, although the Plaintiff was not married on or before the first of *January*, 1834.

The first point for determination then is, whether— independently of the statute and upon the assumption that the Plaintiff has not acquired a legal title, nor is now nor has been in a condition to compel, by means of a Court of Law, the lord or the heir to confer on her a legal title

title to the freebench which she claims,—she is entitled to the assistance of a Court of Equity, and I am of opinion that this question must be answered against the Plaintiff. It is one *positivi juris* merely, one to be decided upon precedents and by analogy to precedents, and not in any sense, or not in any other sense, upon a notion of what is or may be reasonable. But it appears to me that she is supported in it neither by any precedent now to be regarded as of authority, nor by analogy to any such precedent, and that, on the contrary, there are authoritative precedents, which, directly or by analogy, support the heir's contention in this respect. I need scarcely refer to *Chaplin v. Chaplin* (a); *Casborne v. Scarfe* (b); *Godwin v. Winsmore* (c); *Dixon v. Saville* (d) and *Forder v. Wade* (e); but I will allow myself to read the chief part of Lord *Redesdale's* instructive judgment in *Darcy v. Blake* (f).

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“ The general principle on which Courts of Equity have proceeded in cases of dower is, that dower is to be considered as a mere legal right; and that equity ought not to create the right where it does not subsist at law: that, therefore, there can be no dower of an equity of redemption reserved upon a mortgage in fee, though there may of an equity of redemption upon a mortgage for a term of years; because in that case the law gives dower subject to the term. A Court of Equity will assist a widow by putting a term out of her way where third persons are not interested. But against a purchaser, a Court of Equity will not give that assistance, as in *Lady Radnor v. Vandebendy* (g). The difficulty in which the Courts

(a) 3 *P. Wms.* 229.

(b) 1 *Atk.* 603.

(c) 2 *Atk.* 525.

(d) 1 *Bro. C. C.* 326.

(e) 4 *Bro. C. C.* 521.

(f) 2 *Sch. & Lef.* 388.

(g) *Prec. Ch.* 65, by the name of *Lady Radnor v. Rotherham*, *Show. Parl. Cas.* 96.

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Courts of Equity have been involved with respect to dower, I apprehend, originally arose thus;—they had assumed, as a principle in acting upon trusts, to follow the law; and according to this principle, they ought in all cases where rights attached on legal estates to have attached the same rights upon trusts, and consequently to have given dower of an equitable estate. It was found, however, that in cases of dower, this principle, if pursued to the utmost, would affect the titles to a large proportion of the estates in the country; for that parties had been acting, on the footing of dower, upon a contrary principle, and had supposed that by the creation of a trust the right of dower would be prevented from attaching. Many persons had purchased under this idea; and the country would have been thrown into the utmost confusion if the Courts of Equity had followed their general rule with respect to trusts in the cases of dower. But the same objection did not apply to tenancy by the courtesy; for no person would purchase an estate subject to tenancy by the courtesy without the concurrence of the person in whom that right was vested. This I take to be the true reason of the distinction between dower and tenancy by the courtesy. It was necessary for the security of purchasers, of mortgagees, and of other persons taking the legal estates, to depart from the general principle in case of dower; but it was not necessary in the case of tenancy by the courtesy. Pending the coverture, a woman could not alien without her husband, and therefore nothing she could do could be understood by a purchaser to affect his interest; but where the husband was seised or entitled in his own right, he had full power of disposing, except so far as dower might attach; and the general opinion having long been that dower was a mere legal right, and that as the existence of a trust estate previously created prevented the right of dower attaching at law, it would also prevent the property from

all claim of dower in equity, and many titles depending on this opinion; it was found that it would be mischievous in this instance to the general principle that equity should follow the law; and it has been so long and so clearly settled that a woman should not have dower in equity who is not entitled at law, that it would be shaking everything to attempt to disturb the rule. In point of remedy a woman claiming dower may be assisted in equity; a Court of Equity will put out of her way a term which prevents her obtaining possession at law; but that is only as against an heir or volunteer, not a purchaser; the heir or volunteer being considered as claiming in no better right than she does. When, therefore any question of dower has arisen in Courts of Equity, and doubts have been entertained of the title to dower, the constant practice in *England* has been to put the widow to bring her writ of dower at law. The Courts will assist her in trying her right and enjoying the benefit of it, if determined at law in her favour, by giving her a discovery of deeds, by ascertaining metes and bounds; and they do not require her to execute the writ with all the formalities necessary at law, and, the right being ascertained by judgment at law, will give her possession according to her right; but still they require that the question of her title to dower, if subject to doubts, should be determined at law. What was thrown out by Sir *Joseph Jekyll* in *Banks v. Sutton* (a) has been long overruled (b). The rule of Courts of Equity, so far as it excludes a widow from dower of an equitable estate against an heir or volunteer, goes, perhaps, beyond the reason of the rule. But I have called this subject to my recollection a good deal, by looking into the authorities since this case was first mentioned, and the decisions to the full extent are so old, so strong and so numerous—

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(a) 2 P. Wms. 700.

(b) See Cor's note (1), 2 P. Wms. 719.

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so generally adopted in every book on the subject, and so considered as settled law—that it would be very wrong to attempt at this time to alter them.”

In the present instance, if the property purchased by *George Smith* in 1845 had been, at his request, surrendered by the vendor to the use of a third person and his heirs, according to the custom of the manor, and that third person had been admitted under the surrender accordingly, so as to become complete tenant to the lord on the rolls, and had then, in the husband's lifetime, by his desire, executed a declaration of trust acknowledging him to be the beneficial owner, and the estate to be vested in the tenant on the rolls, merely as a trustee for the husband, or if without surrendering at all the vendor had, by the purchaser's desire, merely executed a declaration of trust of the tenements in his favour, or if the purchase had, at his death, been in no sense completed, but rested merely in contract, and had, after his death, been completed by the heir with his own or the purchaser's money; it seems perfectly clear that not in any one of those states of circumstances would the plaintiff have had any legal or any equitable right to claim freebench (the statute being considered as not applicable). I think that she has in equity no better title in the actual circumstances of the case—a remark subject to the qualification that if she has a legal title or a legal right, this Court will possibly assist her as it assists a widow legally entitled to dower of freehold estate. The husband who (it needs not be repeated) did not take by descent, having never been admitted, his heir has also never been admitted; and, without saying what I might have thought of the matter, if the heir had acted fraudulently, I cannot think that the mere fact, that (though in possession as heir, and though having been admitted to other tenements of which his ancestor the husband died indisputably

putably seised in fee, as a copyholder, according to the custom of the manor) the heir has not been nor sought to be admitted to the tenements in question, amounts to conduct, that the Plaintiff is entitled to characterize, as a fraud upon her, or as a breach of duty to her. There is nothing else, and therefore there is, I apprehend, nothing against his conduct, however much he may have been actuated by wishes adverse to the Plaintiff; and, as she could not I conceive have required in her husband's lifetime, that he should be admitted, or have complained of him for not taking that step, so I do not see that she has any better right in this respect against the heir.

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Perhaps it would be a stronger case than that before us if the vendor and the heir after *George Smith's* death had agreed together to cancel the surrender or treat it as a nullity, and to constitute the vendor formally and expressly a trustee for the heir. But I am not prepared to say that, even so, the Plaintiff could have had relief.

Then, upon the merely legal view of the matter (with reference to which the judgments in *Doe v. Clift* (a) are worth consulting), I conceive that, as in *Vaughan v. Atkins* (b) (an authority concerning which I wish to be understood as intimating neither assent nor dissent; but I may remark, in passing, that Mr. *Lee* denies having intended, at the Rolls, to represent it as, in his opinion, a good or a binding precedent), the heir had been admitted, it does not assist the Plaintiff, who, according to my impression, is without any legal title, without any claim available in a Court of Law, the custom of free-bench, as alleged, appearing to me not to extend to her case.

I consider

(a) 12 A. & E. 566.

(b) 5 Burr. 2764.

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I consider that, as matters are, the husband of the Plaintiff cannot be taken, by relation or otherwise, to have been seised of these tenements, within the meaning of the custom; and—the doubt—that (especially considering what is said by the Court in page 579 of the report of *Doe v. Clift* (a)) I entertain upon this merely legal point,—namely, whether there is, at present, any *locus standi* for her in a Court of Law, being slight, if any,—I am not in favour of troubling a common law judge to hear an argument upon it with us; but supposing the Plaintiff desirous to try what, by way of mandamus or otherwise, she can do in a Court of Law, I am willing to retain the bill for a twelvemonth, in order that she may do so, and, if successful, come hither for the details of relief.

The LORD JUSTICE TURNER, after stating the facts, said—

The question which we are called upon to decide is, whether the decree is right in having declared *Joh Smith*, the heir, to be a trustee until his admission, and having directed the account against him, and reserved the widow the liberty to apply for a commission upon his being admitted to the copyholds.

It is, as I apprehend, perfectly well settled now that there is no freebench of a mere equitable estate in copyholds, any more than there is dower of a mere trust estate in freeholds; and, in determining this case, therefore, we must lay out of consideration the fact that *Baseley* stood in the relation of trustee for *Smith*. The Respondent, the widow, can found no title upon that relation, and derive no benefit from it. Her right to freebench, like other rights in copyhold estates, must depend upon the custom,

(a) 12 A. & E. 566.

custom of the manor, and, in order to entitle herself to freebench, she must bring herself within that custom.

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The custom of this manor is in favour of the widows of tenants dying seised; and the first consideration, therefore, is, did *George Smith*, the purchaser, die seised of these copyhold tenements? I think it clear that he did not. *Samuel Baseley*, the vendor, notwithstanding the surrender, continued tenant to the lord; and a surrenderee, as I apprehend, has no estate in the premises until actual admission. He has not even a right to enter upon the tenements surrendered to him. He can do so only by the permission of the surrenderor, and entering by the surrenderor's permission, he becomes his mere tenant at will. *George Smith*, therefore, so far from dying seised of these tenements, never had any estate whatever in them; and if, therefore, the custom is to govern, I see no ground on which this case can be decided in favour of the widow.

It was indeed argued, that as there was dower of freeholds upon a seisin in law, on the ground that the wife could not compel the husband to take the seisin, so there should be freebench of these copyholds upon the same ground; but the answer to this argument is, that — there was here no estate of which the seisin could be taken.

It was argued, however, that *George Smith* had a right to be admitted to these tenements, and that his heir has now that right, and that upon that right being exercised, and the heir being admitted, the admittance will relate back to the surrender, and the widow be entitled to freebench, and the judgment of the Master of the Rolls seems to have proceeded upon that ground. I do not think it necessary to give, and do not give, any

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opinion whatever on this question of relation, for, assuming the point to be in favour of the widow, I am of opinion that this decree cannot be maintained upon that ground. In the absence of any fraud or collusion between the heir and the lord, or the heir and the surrenderor (and no such fraud or collusion is here alleged), the case cannot, I think, in this point of view, be put higher than this, that upon the admission being taken by the heir, the widow will be entitled to freebench; but the question before us is, not what the rights of the widow will be when the heir is admitted, but what are her present rights. This decree does not go so far as to affirm that the heir is bound to take admission at the instance of the widow, and certainly it could not properly do so, for this would be to put it in the power of the ancestor's widow to determine the character of the estate of the heir, whether his estate should be legal or equitable, whether his widow should be entitled to freebench or not.

But if the widow has no present right to freebench (and I see no ground on which she can claim such right) and has no right to compel the heir to do the act which shall give her the right to that estate, I cannot see any way to impose a trust upon the heir. Heirs at law may be trustees where there is an existing equitable estate, but here there is no existing estate in the widow; and if there was, the estate in her would not be equitable. They may be trustees where there has been fraud, but it cannot be said that it is fraud in the heir not to go in and be admitted. Again, they may be trustees where the possession has been obtained by breach of confidence, or is held, contrary to the testator's expressed intention, for the benefit of favoured objects, as in the cases of confusion of boundaries, and of supplying surrenders. But these cases rest, as to the former class, upon breach of duty, which cannot be alleged here; and as to the latter

latter class, upon intention, which is foreign to the question of dower and freebench. There may also be other cases in which trusts may attach upon heirs at law, but to convert the heir into a trustee, in a case like the present, seems to me, with deference to the Master of the Rolls, to be going far beyond any authority, and, I may add, beyond any principle. It is, in effect, to create an estate which the law does not recognize.

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In my opinion, therefore, this decree cannot be supported. If the widow can make anything of the case at law, I think we ought not to deprive her of the opportunity of trying her title there, but I do not see how she can possibly succeed; and certainly I do not feel any such difficulty in the case as would warrant us in asking for the assistance of the Judges upon it.

If the widow desire an opportunity of trying her right at law, and undertake to proceed within a limited time, the bill should be retained; otherwise it must be dismissed.



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NORTON v. COOPER.

July 26.
Before The
LORDS JUSTICES.

An overstatement on the part of mortgagees in possession of a colliery as to the balance represented by them as remaining due on their mortgage, and their refusal to furnish accounts to the mortgagors, except on being paid the expenses of so doing, Held not such vexatious conduct as to deprive them of their costs of a redemption suit.

On their appealing from a decree disallowing such costs, they were held entitled to have their costs of the appeal.

THIS was an appeal of mortgagees from an order of the Vice-Chancellor *Stuart*, made on exceptions to the Master's report and on further directions in a redemption suit.

The mortgage was one of coal and iron stone mine at *Walsall*, with powers of management and of working and of opening new mines, and one of the questions in the cause was whether the mortgagees were entitled to be allowed for their expenditure and costs in the management of the estate any amount beyond 11,550*l.*, which by a proviso in the mortgage, was the limit of the principal monies recoverable by virtue of the security.

The mortgage was dated the 3rd of *September*, 1840, and was subject to a proviso for redemption on repayment, on demand, of 8,585*l.* and interest, and of any future advances which might be made by the mortgagees to the mortgagors, with interest. It empowered the mortgagees, after default in payment of the monies secured by the mortgage, to enter into and hold the premises, and the mines and works in and connected with the same, and to dig and search for the coal, ironstone and other minerals which were contained, not only in those mines which were already open and being worked, but also in any other mines or veins which it should be thought expedient to open; and for that purpose to use the shafts and machinery then already on the premises, and to construct new shafts, pits, watercourses, buildings and machinery.

Immediately

Immediately after the execution of this deed the mortgagees entered into possession, and continued working the colliery and mines until the early part of the year 1846, when they leased the colliery at a royalty.

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One of the mortgagors was declared bankrupt in 1843; his assignees and the other mortgagor were the Plaintiffs in the suit.

Applications had been made by the Plaintiffs to the mortgagees before the institution of the suit for accounts, which the mortgagees offered to furnish on being paid their expenses in preparing them and on having a reasonable assurance that the mortgagors intended to redeem the mortgage; but they represented that the incumbrances on the property exceeded 23,000*l.*, and that, having regard to the value of the property, the equity of redemption was valueless.

In reply to one of several letters from the solicitor for the assignees, in which he called for the accounts and disputed the existence of a demand to the extent of 23,000*l.* on the part of the mortgagees, the Defendants' solicitor, on the 10th of *April* 1847, wrote as follows:—"I am sorry to appear neglectful of your letter of the 2nd instant, but the truth is my hands are full of business. It is not the desire of my clients to refuse you any account to which your clients may be entitled, but I do on their behalf object to rendering useless accounts. Some years ago I offered you accounts if the assignees would submit to the terms they would be placed under upon filing a bill to redeem. I make you the same offer now. As to your idea that my client's claim which they have a right to enforce cannot amount to 23,000*l.*, I presume you refer to the claim of Messrs. *Cooper & Purton*. If so you are correct; but you will find my letter referred to

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 ~~~~~  
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to the total charge on the *Birchhills*, which includes the prior mortgage. There can be no doubt whatever that the total charge now existing exceeds 23,000*L.*, a sum that renders the idea of redeeming quite chimerical."

In a subsequent letter of the 22nd of *April* 1847, also written by the Defendants' solicitor in answer to a letter from the solicitor to the assignees of the bankrupt again asking for the accounts, the solicitor for the mortgagees said, "I repeat, however, what I have so often stated, that it is useless trouble for your clients to follow this estate."

The bill prayed for an account of what was due to the Defendants for principal and interest on the security of the mortgaged premises, and for an account of the rents, profits and proceeds received by the Defendants, and that in taking such an account, a fair occupation rent, or royalty in the nature of an occupation rent, might be set upon the premises upon which the Defendants entered; and that rests might be made when the rents should appear to exceed the interest in arrear, and that upon payment of what might be found remaining due to the Defendants the premises might be decreed to be conveyed to the Plaintiffs.

The Defendants by their answer claimed 14,969*L.* 8*s.* 3*d.*, as the balance due to them for principal and interest in respect of the mortgage. They further claimed under the provisions of the deed 57,972*L.* 1*s.* 3*d.*, in respect of their outlay in working the colliery.

By the decree made on the hearing the 18th of *November* 1848, the Master was directed to take an account of what was due to the Defendants for principal and interest on their mortgage security, and of the rents, profits

profits and proceeds of the mortgaged premises come to the hands of the Defendants as mortgagees in working the collieries and mines. The decree then directed an inquiry, whether the Defendants had properly expended any sums of money upon any and what lasting improvements, and an account of all monies properly expended by the mortgagees in the manner authorized by the mortgage deed.

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The Master, by his report, dated the 23rd of *December* 1853, found that there was due to the Defendants, upon the security of the mortgage, the sum of 16,654*l.* 15*s.* 6*d.*, for principal and interest, and that the Defendants, the mortgagees, had properly expended several sums of money amounting to 60,027*l.* 9*s.* 10*d.* in the manner authorized by the deed; that they had paid off prior incumbrances to the extent of 3,747*l.* 14*s.* 10*d.*; that they had received sums to the amount of 74,637*l.* 4*s.* 3*d.*, on account of the rents and profits of the mortgaged premises, and that they were not chargeable with any sums which, but for wilful default, they might have received.

Exceptions were taken by the Plaintiffs to this report; and the exceptions and further directions came on to be heard together before the Vice-Chancellor.

His Honor overruled the exceptions; and held the mortgagees entitled to be allowed the sum of 60,027*l.* 9*s.* 10*d.*, as money properly expended by them, and also the amount paid to the prior incumbrancers.

On further directions, his Honor made a decree for redemption on payment of the amount due from the mortgagors, to be ascertained in Chambers.

On



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On the question of costs, his Honor said, that the rule was clear, that if a mortgagee were guilty of improper or oppressive conduct, the Court would make him pay the costs, or refuse him his costs, according to the degree of his misconduct. That must depend upon the circumstances of each case. Here the complaint of the mortgagors was, that they were refused the accounts, or rather that when they applied for them, the accounts were offered upon the unreasonable terms of paying for them and undertaking to redeem; and it was argued, on behalf of the mortgagors, that the mortgagees, having alone the power of saying whether the property was worth redeeming or not, it was unreasonable in them to refuse the accounts, except upon these terms. His Honor considered the question to be, whether, upon the terms of this mortgage contract for conducting large mining transactions, it was gross misconduct on the part of the mortgagees to refuse, on the demand of the mortgagors, immediately to render the required accounts, without stipulating that they should be paid for the expense of making them, and should have some reasonable assurance that the mortgage would be redeemed. His Honor could not say, that the mere refusal by the mortgagees so made was such improper conduct as that the Court could visit them with the costs. But though there appeared to be no ground for charging the mortgagees with the costs of the suit, his Honor was not altogether satisfied with the conduct of the mortgagees. It was true that the account could not easily be taken; but it was not reasonable on the part of the mortgagees so entirely to thwart the Plaintiffs in regard to their right of redemption, as to compel them to file the bill. The mortgagees had alleged, that upon their estimate of the account, 23,000*l.* or more was due to them, and that there could be no redemption except at that sum, and they used, in the correspondence, expressions which

his

his Honor thought unjustifiably strong, in order to repress any disposition on the part of the mortgagors to exercise their right of redemption. Although, therefore, the mortgagees were not to be charged with the costs of the suit, his Honor declined to allow any costs up to and including the hearing and decree.

1854.

  
NORTON  
v.  
COOPER.

Against this decision, the mortgagees appealed.

Mr. *Wigram* and Mr. *Hardy*, for the Appellants.

Mr. *Malins* and Mr. *Kinglake*, for the Plaintiffs.

The case of a mortgagee in possession differs from that of a mortgagee not in possession as to the duty of rendering accounts. If a mortgagee in possession will not furnish accounts, but takes upon himself to say that a certain amount is due, and it appears on the account being taken that so much is not due, it is clear that he has wrongfully necessitated the suit.

They referred to *Binnington v. Harwood* (a).

*The* LORD JUSTICE KNIGHT BRUCE.

This is, so far as I am aware, a case of the first impression. The general rule is, that a mortgagee is so entitled to his costs as that he cannot be deprived of them, unless his conduct has been vexatious. It appears in the present instance, now that the account has been taken, that a considerable sum is due to the mortgagees, though probably or certainly less than they claimed. I cannot however say, that their claim was vexatious. I think that the circumstances of the case do not make it an exception to the general rule.

*The*

(a) *T. & R.* 477. See *Harmer v. Priestley*, 16 *Beav.* 569.

1854.

NORTON  
v.  
COOPER.

*The LORD JUSTICE TURNER.*

A mortgagor having lost his legal title to redeem, and coming into equity, can only be admitted to redeem on payment of the costs, unless the mortgagee has so conducted himself as to have lost his right to claim them. What are the circumstances of this case? The mortgagees offered to render an account. But the subject of the security was a working colliery, and the accounts which the mortgagors required were not the ordinary accounts of the colliery. A distinct account would have been necessary to satisfy the requisition of the mortgagors. The mortgagees could not, I think, be called on to render such an account at their own expense. If they had refused to exhibit their books, there might have been something to be said. I think that there was nothing to justify the mortgagors in filing a bill, seeking to charge the mortgagees with an occupation rent, and to disallow them the expenses of working the mine. The deviation from the rules of the Court made by this decree might, I think, produce great confusion in subsequent cases. As the Appellants are mortgagees, they must have the costs of the appeal.

1854.

## TOFT v. STEVENSON.

THIS case, which is reported *ante*, Vol. 1, page 28, came on to be finally disposed of; the inquiry directed on the hearing of the appeal having been taken, and a report having been made as against those Defendants who had not admitted the agency of Mr. *Cartwright*, that Mr. *Cartwright* wrote the letter of the 13th of *March* 1834 as agent, and by the authority of *Read* and *Stevenson*.

Mr. *Lee*, Mr. *Glasse* and Mr. *Fooks*, for the Plaintiffs.

They insisted that a decree ought now to be made in accordance with the prayer of the bill, and that interest should be paid on the purchase-money from the date of the agreement.

Mr. *Teed* and Mr. *Rogers*, for the trustees.

Although the Court has held, that the Statute of Limitations has not run, as regards the principal of the purchase-money, interest cannot be recovered for more than six years; 3 & 4 *Will.* 4, c. 27, s. 42; *Hodges v. Croydon Canal Company* (a). Here the purchase-money became due on the 30th of *May* 1811, the day fixed by the contract of sale for the payment. But for the acknowledgment in 1834, on which the Court has proceeded, the principal debt would have been barred.

(a) 3 *Beav.* 86.

seeking to enforce the vendor's lien on the estate for the purchase-money:—*Held*, that the 42nd section of the statute did not apply to the arrears of interest, but that the whole was recoverable from the 13th of *May*, 1811.

July 27.

Before The  
LORDS JUSTICES.

A contract for the sale of an estate made in *March* 1811, stipulated that the purchase-money should be paid on the 13th of *May* following.

The purchase-money was not paid, but the purchaser entered into possession, and he and persons claiming under him continued in such possession. In 1834 their agent

signed a written acknowledgment of the vendor's title sufficient to take his lien for the principal of the purchase-money out of the Statute of Limitations 3 & 4 *Will.* 4, c. 27, s. 40.

The assignees of the vendor filed a bill

1854.

TOFT  
v.  
STEVENSON.

The interest became due de die in diem, and consequently no more than six years can be recovered. [The LORD JUSTICE KNIGHT BRUCE. Is this suit in the nature of one for specific performance, so far as the agreement has not been performed?] That is not the frame of the bill. The Plaintiffs only seek to establish a lien, as was the case in *Hodges v. Croydon Canal Company*.

*Hunter v. Nockolds (a)*, and *Cox v. Dolman (b)* were also cited.

With reference to the latter case, Mr. Teed, who was one of the counsel in it, stated, that the circumstance there having been there a subsisting term, on which the trustees might have recovered, was insisted upon both himself and his junior, Mr. J. V. Prior.

Mr. Faber, Mr. Metcalfe and Mr. Hughes appeared for the other parties.

*The LORD JUSTICE KNIGHT BRUCE.*

My learned brother doubts whether there were sufficient materials at the original hearing, independently of the additional evidence now obtained, to entitle the Plaintiffs to a decree against all the Defendants. Upon that I need say no more than this, that, if it was an error to direct an inquiry, it was an error on the right side. The inquiry, however, is now answered; and, it being clear that the case is taken out of the 40th section of the Act, I am also of opinion that it is not within the 42nd section, and that there is no limitation with respect to interest.

*The*

(a) 1 Mac. & Gor. 640.

(b) 2 De G., M. & G. 592.

*The* LORD JUSTICE TURNER.

1854.

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v.  
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By the 40th section it is enacted, "That after the said 31st day of *December* 1833, no action or suit or other proceeding shall be brought, to recover any sum of money secured by any mortgage, judgment or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit or proceeding shall be brought but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments if more than one, was given."

Now when did the present right accrue to the Plaintiffs? That must depend upon the time when the title was shown upon the original contract. For the money did not become payable on the 30th of *May* 1811. The right would accrue upon the title being perfected by evidence.

With regard to the argument founded upon the form of the bill in this suit, the suit seeks a right consequent and dependent upon the specific performance of the original agreement. The Plaintiffs ask for the unpaid purchase money, which implies that the purchase money is to be paid, and it could not be paid unless the contract were completed. I think that the Court was too merciful in directing an inquiry whether there had been any acknowledgment. The right to the principal did not  
accrue

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TORT  
v.

STEVENSON.

accrue till the time arrived for completion, and the right to receive interest accrued at the same time. The words of the Act are (a),—"That after the said 31st day of December 1833, no arrears of rent, or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent: provided nevertheless, that where any prior mortgagee or other incumbrancer shall have been in possession of any land or in the receipt of the profits thereof within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years."

Now in this case the interest could not be due until the principal money became payable. If no title was made, there was no right to principal or interest. It seems to me that the time has not yet arrived at which the money is due.

*Hodges v. Croydon Canal Company* (b) is distinguishable, because there the interest was presently payable and

(a) Sect. 42.

(b) 3 Bosc. 86.

and there was nothing to stop it. In this case it was not payable till it was seen whether the contract could be completed, and the Plaintiffs could have no lien except upon the terms of completing the original contract. It is upon completion that interest becomes due, although to be calculated from the inception of the contract.

1854.  
TOFT  
v.  
STEVENSON.

CHILD v. DOUGLAS.

**T**HIS was an appeal from an order of Vice-Chancellor Wood granting an injunction to restrain the Appellant from building a wall in contravention (as it was alleged) of a covenant. The case is reported below in Mr. Kay's Reports (a), where the facts are fully stated.

August 1.  
Before The  
LORDS JUSTICES.

The covenant in question was that the covenantor, his executors, administrators or assigns, would not erect any building within a certain distance from the street. The distance was left in blank in the deed, but was stated in a previous agreement between the parties. The Defendant had in 1847 built a wall five feet high at right angles to the street in question and coming close up to it. He had quite recently commenced heightening the wall with the intention of raising it to the height of fifteen feet, whereupon the plaintiff (who in 1853 purchased adjoining property, in respect of which he claimed a right to enforce the covenant) filed the bill in the present suit for an injunction, and obtained, on motion, the order from which this appeal was brought.

Acquiescence in the violation of a covenant to a certain extent held a sufficient objection to an interlocutory application for an injunction against a greater violation of it.

Where on a motion for an injunction to restrain an alleged breach of covenant the question in dispute appeared doubtful,—*Held*, that the burden of proof was on the Plaintiff to show that the balance of convenience was in favour of granting it the injunction.

On the appeal coming on, their Lordships inquired whether the parties would agree to treat the cause as if

(a) Page 560.



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CHILD  
v.  
DOUGLAS.

it had come on for hearing, having time if requisite to add to the evidence; but no agreement to that effect having been come to, the case was heard on the interlocutory application only.

Mr. *Daniel* and Mr. *Amphlett* were for the Appellant.

Mr. *Rolt* and Mr. *Muckeson* for the Respondent.

*The LORD JUSTICE KNIGHT BRUCE.*

This is not a case of nuisance or of apprehended or intended nuisance, and therefore all considerations peculiarly belonging to such a case are irrelevant to the present. The dispute is, as to a supposed violation of a contract, alleged on one side and denied on the other; and the points for decision at the hearing of the cause will be:—first, whether, by the covenant mentioned in the bill or by any other contract, the Defendant has bound himself not to build upon a piece of ground, six feet wide, intervening between the front of his house and the causeway; secondly, whether (if he has), a boundary or fence wall, five feet or fifteen feet high (as the case may be), is a breach of the covenant or contract (if any); thirdly, whether, if there is such a covenant or contract which is binding on the Defendant, the Plaintiff is a person who is entitled to sue upon it or to enforce it; fourthly, whether, if the Plaintiff is otherwise right, the circumstance that, for several years before the filing of the bill, the wall, the heightening of which is complained of, existed to the height of five feet, does or does not constitute such a case of acquiescence, on the part of the Plaintiff, as to preclude any interference of the Court, at least on an interlocutory application such as the present is.

As to three of these four points, the present impression  
upon

upon my mind, on the materials before the Court, is unfavourable to the Plaintiff's case. Still, if the act intended to be done by the Defendant were one which, if completed, would substantially or seriously prejudice the Plaintiff or his house, I should probably have been disposed, even with the view which I take of three of the points, to interfere by injunction until the question in dispute could be decided at the hearing.

1854.  
CHILD  
v.  
DOUGLAS.

But, considering that what is intended by the Defendant is not substantially mischievous, not seriously prejudicial to the Plaintiff, and having the impression, which I now have, that he will probably not ultimately succeed, I apprehend that it is better not to interfere on the present occasion by injunction, but to direct the motion to stand over till the hearing, the Defendant undertaking not in the meantime to carry the wall higher than fifteen feet six inches, and to abide by any order which the Court may make as to removing what he has or shall have built. It must be understood, that this is dealt with as an interlocutory application only, and that the Court will consider itself at liberty to decide every point, at the hearing, as it may then think just.

*The* LORD JUSTICE TURNER.

This case raises questions of importance, which will have to be decided at the hearing. The Plaintiff has elected that the cause shall not now be heard, and the question therefore now to be decided is chiefly one of comparative inconvenience. On the Plaintiff's side there is the obstruction to the view from his house, while on the part of the Defendant there is the inconvenience of being overlooked. It is difficult to decide, on which side the balance of these inconveniences turns. But the Plaintiff is the person applying for an injunction, and it is on him that the burden lies of showing that his inconvenience

1854.

CHILD  
v.  
DOUGLAS.

## CASES IN CHANCERY.

venience exceeds that of the Defendant. He must make out a case of comparative inconvenience, entitling him to the interposition of the Court. In my opinion he has failed to do so, and that ground alone seems to me to be sufficient to dispose of the present application. But in addition to that ground, there is the fact that the wall has existed to the height of five feet ever since 1847, six years before the Plaintiff became the purchaser of the land in respect of which he claims the right under the covenant. The persons, therefore, through whom the Plaintiff claims, allowed the alleged breach of covenant to exist without seeking relief, either here, or in damages for six years, before the Plaintiff's title accrued. I think this is of great importance, more particularly having regard to the facts of this case, one of which is, that limitation of the distance within which buildings were to be erected was left in blank in the deed.

The lapse of six or eight years without any attempt to interfere tends strongly, I think, to show that there may have been the result of an arrangement limited to a certain limit undefined. Whether, therefore, on the ground of convenience or of acquiescence, I think that the Plaintiff is not made for the interference of the Court on the present application. It is said, that a wall is not so great an inconvenience as one of six feet. But an action might have been brought, and acquiescence in one is not acquiescence in the other. But an action might have been brought, and acquiescence in one is not acquiescence in the other. I think, to grant an interlocutory injunction.

1854.  
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In the Matter of the DOVER AND DEAL RAIL-  
WAY, CINQUE PORTS, THANET AND  
COAST JUNCTION COMPANY,

and

In the Matter of the JOINT STOCK COM-  
PANIES WINDING-UP ACTS, 1848 and  
1849.

Cases of CLIFTON and others.

**T**HIS was an original application of alleged creditors, who had made claims under the order for winding up the above Company. The application was made on the ground of the applicants being prejudiced (as they alleged) by an order of the Lords Justices staying all proceedings under the winding-up order. The circumstances attending the formation and winding up of the Company are stated in *Mowatt and Elliott's Case (a)*, and Lord *Londesborough's Case (b)*.

Nov. 9.  
Before The  
LORDS  
JUSTICES.  
Where one contributory having agreed to pay all debts proved before the Master and the costs of winding up a Company, obtained an order to stay all proceedings under the winding-up order, without serving with notice of his application claimants who had tendered before the Master proofs of alleged debts which of had stood over for further investigation :—

(a) *Ante*, Vol. 3, p. 254.

(b) *Ante*, Vol. 4, p. 411.

*Held*, that the claimants were entitled to have this obstruction to their proceedings removed, and to have the Master's judgment on their claims.

The official manager not having informed the Court of these claims when the order staying proceedings was made, was not allowed his costs of the subsequent application.

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 CASES OF
 CLIFTON
 and Others.

of the applicants (Mr. *Hook* and M Master had, in 1850, made an order to deliver up certain papers, held by the applicants, which they claimed a lien for their official manager being directed by the court to pay sufficient money out of the first fund to his hands to pay the bills, with interest and taxation. No funds, however, had been obtained for order for taxation had been obtained from Mr. *Thompson*, and the taxation was

The present application was, that the applicants be permitted to prosecute their claims

Mr. *Follett* and Mr. *Goodeve*, in support of the

The 58th section of the Winding-up Act relates to the applicants to the Master's judgment, and any debt against the Company; and the proceedings ought not to have been taken against their backs.

Mr. *Bacon* and Mr. *Hislop Clark* in support of the *borough*.


The applicants are not prejudiced by the delay in such proof as they could make, and they are at liberty to proceed at once. *Hadow (a)*. The 58th section expresses that the act shall not increase or diminish the liability of the applicants. The object of the Winding-up Act is to facilitate contributions of the creditors, but to facilitate contributions of the creditors, there is now to be no contribution order has ceased to exist, and the proceedings were properly stayed.

Mr. *Selwyn*, for the official manager, asks for costs.

(a) 5 *Esch.* 726.

The LORD JUSTICE KNIGHT BRUCE.

These claimants have not completed their proof before the Master. Their claims are still pending, and they ought to be at liberty to proceed as if no order to stay proceedings had been made. When we made the order of *May* last, we were not informed, as we ought to have been, that these claims were still in existence.

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 CLIFTON
 and Others.

The LORD JUSTICE TURNER.

The order for staying proceedings was made in the absence of these parties, and the Court was not informed of the pendency of their claims. The only question, therefore, is, whether there is anything in the act of parliament which precludes them from relief? I do not think that there is. The 73rd section says, "that creditors shall exhibit such proof as they may be able," and they are clearly entitled, after such proof, to the Master's decision upon the question of debt or no debt^(a). There has been no doubt very great delay, but the protracted litigation in this matter may account for, and is some excuse for it. The present claimants, Mr. *Clifton* and the two others, must have liberty to proceed before the Master. As to the solicitors, they must have liberty to proceed with the taxation; and the motion must stand over until the taxation is completed.

The LORD JUSTICE KNIGHT BRUCE.

The order will be, that Mr. *Clifton*, and the two other claimants, shall be at liberty to proceed before the Master upon their respective claims, as if no order for staying proceedings had been made. The taxation of the bills of the solicitors will also proceed as if no such order had been made. Any defence upon the ground of delay, or otherwise, will be open to Lord *Londesborough*, and the official manager. The order will be
 without

(a) See *Terrell v. Hutton*, 4 *House of L. Ca.* 1091.

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 CLIFTON
 and Others.

without prejudice to any other question, and the cost of all parties will be reserved. We do not give the official manager his costs, as he did not inform the Court, when the order of *May* last was made, that the claims were still pending.

In the Matter of the UNIVERSAL SALVAGE COMPANY and of the JOINT STOCK COMPANIES WINDING-UP ACTS 1848 and 1849.

MURRAY'S EXECUTORS' CASE.

Nov. 9,
 Before The
 LORDS
 JUSTICES.
 The 7 & 8
 Vict. c. 110,
 s. 29, re-
 quiring that a
 contract or
 dealing be-
 tween a Com-
 pany and any
 director shall
 be submitted
 for confirma-
 tion "to the
 next general
 or special
 meeting of the
 shareholders,
 to be sum-
 moned for that
 purpose," Held
 to mean that
 the contract or dealing shall be submitted either to the next general meeting of the shareholders, or to a special meeting of the shareholders summoned for that particular purpose.

THIS was a motion, by special leave, on behalf of the executors of the Honorable *Charles James Murray*, deceased, to discharge, reverse or vary the certificate of Master *Richards*, the Master charged with the winding up of the above Company, dated the 20th July 1854, whereby he certified that he had disallowed the claim of the executors against the company for a sum of 300*l.* and interest from the 4th *May* 1847 in respect of money at that time lent to the Company. The following were the facts of the case as they appeared on the proceedings.

The Company was projected in 1844, and obtained a certificate

Where a report was read and adopted at a general meeting, and contained a vote of a resolution respecting an advance of money by directors of the Company:—Held that it was a sufficient submission to the shareholders of the terms of the advance supposing it to be a contract or dealing within the meaning of the above section, in which *quære*.

The case of *Teversham v. Cameron's Coalbrook, &c. Railway Company* (3 De G 296) observed upon.

certificate of complete registration under the Joint Stock Companies' Registration Act, 7 & 8 *Vict.* c. 110, on the 9th *January* 1846. The Deed of Settlement of the Company was dated the 18th *August* 1845, and under it (clauses 121 and 124) the directors had power to borrow money on bills or notes with the consent of the proprietors, with a restriction not to give notes, bonds or securities for the payment of money exceeding 10,000*l.*

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MURRAY'S
EXECUTORS'
CASE.

Mr. *Murray*, the Appellants' testator, was a director of the Company on and previously to the 1st *August* 1845, and he continued to be a director down to the 4th *May* 1848. At a meeting of directors, held on the 24th *April* 1846, a resolution was passed, that it was the duty of the directors as a preliminary measure to raise money among themselves by advancing individually the sum of 300*l.* each on loan notes of the Company, so as to supply funds for payment of pressing debts. On the 1st *May* 1846, a resolution was passed that promissory notes of the Company should be signed by two directors, and countersigned by the secretary, for repayment at twelve months with interest at five per cent. of the advances made by the directors in pursuance of the resolution of the 24th *April*. In consequence of these resolutions Mr. *Murray* advanced 300*l.*, which was secured by a promissory note, dated the 1st *May* 1846, payable twelve months after date; and this note was renewed on the 4th *May* 1847 by the note in respect of which the present claim was made; which bore date the 4th *May* 1847, and was made by two of the directors of the Company, who thereby, on behalf of the Company, promised to pay to Mr. *Murray* or his order 300*l.*, with interest at five per cent., for value received by the Company.

It

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 MURRAY'S
 EXECUTORS'
 CASE.

It appeared that the first annual general meeting of the Company was held on the 30th *July* 1846, and at that meeting a report by the secretary of the Company was read, which, among other matters, mentioned in distinct terms the resolution of the 24th *April* 1846 above stated: at this meeting auditors were appointed, and the meeting was adjourned to the 29th *October* to receive the report of the auditors. The adjourned meeting was held on the 29th *October* 1846 accordingly: the minutes of the proceedings of the former meeting were read and adopted, together with the secretary's report, and a report which had in the meantime been made by the auditors, dated the 26th of *October* 1846, with the balance sheets of the accounts of the Company prefixed to it: a vote of thanks was also passed to the directors in terms "for their liberal and honourable conduct in their resolution of the 24th *April* last to raise amongst themselves—by advancing individually the sum of 300*l.* each on loan notes of the Company—a fund to supply payment of the then pressing debts of the Company." In the balance sheet prefixed to the auditors' report the following entry appeared under the head of "Liabilities, 18th *July* 1846,—promissory notes,—bankers, *Jones, Lloyd & Co.*, 1,500*l.*; directors for loans to the Company—Hon. *Charles James Murray*, 300*l.*; Mr. *Christopher Lund*, 300*l.*; Lieutenant-Colonel *Coffin*, R.A., 300*l.*; Dr. *Marshall*, 300*l.*; Captain *Price*, R.N., 300*l.*"

It was admitted that the 300*l.* advanced by Mr. *Murray* had never been repaid, and it was not contended that the money had been otherwise than properly applied. The claim of the executors was, however, resisted by the official manager before the Master, and the point taken was, that, under the circumstances of the case and having regard to the provisions of the 29th section of the Act

7 & 8 *Vict.*

7 & 8 *Vict.* c. 110, the debt was not one which could be proved against the Company, being a contract or dealing by a director with the Company and not confirmed as the act required. The Master acceded to this view of the case and certified accordingly: he considered the words of the section in reference to the confirmation by the shareholders of transactions of this nature to mean, "the next general meeting to be summoned for that purpose or special meeting to be summoned for that purpose;" and that, therefore, there had not been in the present instance sufficient notice given of the meeting to enable the shareholders to know of the transaction in question. The executors now appealed as above stated.

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EXECUTORS'
CASE.

The 29th section of the Act 7 & 8 *Vict.* c. 110, on which the question turned, provides, that if any director "be either directly or indirectly concerned or interested in any contract proposed to be made by or on behalf of the Company, whether for land, materials, work to be done, or for any purpose whatsoever during the time he shall be a director, he shall on the subject of any such contract in which he may be so concerned or interested be precluded from voting or otherwise acting as a director; and that if any contract or dealing (except a policy of assurance, grant of annuity or contract for the purchase of an article, or of service which is respectively the subject of the proper business of the Company, such contract being made upon the same or the like terms as any like contract with other customers or purchasers) shall be entered into in which any director shall be interested, then the terms of such contract or dealing shall be submitted to the next general or special meeting of the shareholders to be summoned for that purpose; and that no such contract shall have force until approved and confirmed by the majority of votes of the shareholders present at such meeting."

The

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 EXECUTORS'
 CASE.

The 11th article of the 25th section of the same act provides, that a completely registered Company may "make from time to time at some general meeting of shareholders, specially summoned for the purpose, by-laws for the regulation of the shareholders, members, directors and officers of the Company."

Mr. *Bacon* and Mr. *Baggallay*, for the Appeal.

The loan was one which it was perfectly competent for the directors to make; and, looking at the proceedings at the meetings, and the adoption of the reports of the secretary and auditors, it is impossible to say, that the shareholders had not due notice of the transaction, or that there had not been a confirmation of it by them, within the meaning of the statute, which cannot be properly construed as requiring a general meeting to be summoned for the purpose of the confirmation. The case of *Teversham v. Cameron's Coalbrook Steam Coal and Swansea and Lougher Railway Company* (a), decided on demurrer by the Lord Justice *Knight Bruce*, when Vice-Chancellor, was relied on before the Master, and apparently led him to decide against the claim; but it does not precisely appear from the report under what circumstances the loan there was made, and at all events there was no confirmation by the shareholders.

[*The Lord Justice Knight Bruce*.—If all that was material of the bill is stated in the report, that case may deserve further consideration.]

Mr. *Selwyn*, for the official manager, in support of the Master's decision.

It was immaterial whether the transaction here was *bonâ fide*; it was a contract or dealing of the kind prohibited

(a) 3 *De G. & S.* 296.

hibited by the statute, and could only be made valid by the means there pointed out, namely, by being submitted to the shareholders for their approbation, and being sanctioned by them at a meeting, whether general or special, summoned for that purpose. The decision of *Teversham v. Cameron's Coalbrook, &c.* Railway Company has never been impeached, but on the contrary was followed by the late Vice-Chancellor, Sir *J. Wigram*, in a case not reported. The Master has put a right construction on the words of the act. The requisite notice of the transaction was not given previously to the general meeting in *July*, and whatever was done at the adjourned meeting in *October* must be taken in reference to the original meeting. The eleventh clause of the twenty-fifth section of the act shows what is meant by the words used in the twenty-ninth section; and that a notice may and ought to be given of a particular subject in reference to a general meeting. The act also requires that the terms of the contract should be submitted; and there is nothing to show that this was done in the present case. Therefore, neither as regards the notice, nor as regards the submission of the terms of the contract, have the provisions of the statute been complied with; and the consequence is that the claim must be disallowed.

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We need not trouble you, Mr. *Bacon*, for a reply. The Master has acted very properly in asking for the decision of the Court, especially after the judgment pronounced in *Teversham's* case. Whether the decision in that case is one to be adhered to under all circumstances I need not determine now, but I should require much consideration, before I said anything to impeach that case; I should hesitate long before I gave any opinion at variance with it. This case, however, is not governed by it, because there no question of confirmation

arose

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arose in that case, and the act of parliament provides that a contract such as that now in question may be confirmed; it is to be submitted to the shareholders at a meeting, described as the next general or special meeting of the shareholders to be summoned for that purpose. It is said in the first place, that the transaction here was not submitted to the next general meeting of the Company within the meaning of the act, because the words of the act import that there must be a summons applying to a general meeting stating the special matter, and reference is made to the eleventh article of the twenty-fifth section, which speaks of a general meeting specially summoned. That, however, differs from the language of the twenty-ninth section: the words "for that purpose" are omitted; and, on looking at the twenty-ninth section, it is clear that the word "next" does not apply to the words "special meeting," and that the words "next general meeting" are not connected directly with the words "special meeting," or with the following words, "for that purpose." I think the true construction is, that these arrangements are to be submitted to the next general meeting or to a special meeting, summoned for that purpose.

Then it is said, that there was no sufficient submission of the terms of the contract. I do not, however, agree in this, for there was a report containing a notice of the resolution for these directors advancing the money: this report was read at the general meeting, that meeting was adjourned to *October*, and in the meantime the report of the auditors stated the advances. This report was adopted and confirmed at the adjourned meeting; and whether it contained a specific reference to the promissory notes or not, I think that, taking it in connection with the representation to the general meeting, it amounted to a representation of a loan to the Company on the security of promissory notes.

notes. On that intimation it was competent for any shareholder to have raised the question, and taken the opinion of the meeting whether the transaction should be confirmed or not. It appears, however, that the report was adopted, and a resolution of thanks passed to the directors in especial reference to the transaction. I think therefore that there was a sufficient communication to the shareholders of the terms of the contract, and that the present claim, both for principal and interest, must consequently be allowed. I do not intend to give any opinion with respect to the decision in *Teversham's* case.

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I likewise accede to the propriety of the course taken by the Master in this case, though I do not consider it to be governed by *Teversham's* case. On the point whether that was rightly decided, it is unnecessary for me to say anything, and I give no opinion. It seems a just inference from the materials before the Court, that if this money had been lent by a stranger, at interest or not, he would have been entitled to recover, and also that the money was applied to the legitimate purposes of the Company. I therefore think, that the principal sum ought to be allowed; and as to the interest, though I have more doubt, yet as my learned brother is clear also on that, and as the inclination of my own opinion is the same way, I shall concur in the whole of the conclusion at which he has arrived.

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The words "from and immediately after his decease" following a limitation for life, in general point out the order of limitation merely. Where therefore a testator revoked a limitation for life, which was followed by those words, introducing subsequent limitations, Held that the remainders were accelerated.


LAINSON v. LAINSON.

THIS was an appeal from a decree of the Master of the Rolls on the construction of a will. The case is reported in the 18th volume of Mr. *Beavan's Reports* (a).

The testator *John Lainson* devised his freehold estates to three trustees, upon trust to pay certain annuities to his wife for life, and to his son *John*, until he should attain the age of thirty years ; and, from and after such time as his son should have attained his age of thirty years, or should have died under that age, upon further trust to pay the rents to his son *John Lainson*, for and during the term of his natural life, in case he should attain the said age of thirty years ; and, from and immediately after his decease, whether he should or should not live to attain the age of thirty years, to stand seised of and interested in all the testator's said freehold estates in trust for the first and every other son of his said son *John Lainson* successively in tail, with divers remainders over ; and with an ultimate remainder to the testator's own right heirs. The residuary personal estate was bequeathed on trust to invest in freehold or leasehold property, which was to be held upon the same trusts as the freeholds.

By a codicil the testator, after reciting that his son had married, and that the testator had entered into a bond, as a settlement on the marriage, the testator re-
voked

roked the trust to pay the rents to *John Lainson*, and, in substitution for such provisions, he directed the trustees to pay the son an annuity of 300*l.* a year for his life, in addition to a former annuity secured to him. And the testator thereby continued to his said son the same power of jointuring and portioning as if he had been entitled to the rents for life.

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The testator died on the 15th of *June* 1844, leaving *John Lainson*, his eldest son, his heir at law. *John Lainson* the son attained the age of thirty in 1846, having had a son born in 1845.

The Master of the Rolls held, that the codicil operated as an acceleration of the estate of the grandson, and did not create an intestacy.

From this decision the heir at law appealed.

Mr. *C. P. Cooper* and Mr. *Greene*, for the Appellant, referred to *Fitch v. Webber* (a); *Tregonwell v. Sydenham* (b); *Carrick v. Errington* (c).

Mr. *Lloyd* and Mr. *Speed*, for the grandson, cited *Fuller v. Fuller* (d); *Sidney v. Shelley* (e); *Gravenor v. Hallum* (f); *Jackson v. Hurlock* (g); *Carrick v. Errington* (h); *Shepherd's Touchstone*, p. 435.

Mr. *Willcock* and Mr. *Messiter* were for the Plaintiffs.

The

- (a) 6 *Hare*, 145.
- (b) 3 *Dow*, 206.
- (c) 2 *P. W.* 361.
- (d) *Cro. Eliz.* 422.

- (e) 19 *Ves.* 352.
- (f) *Amb.* 643.
- (g) *Amb.* 487.
- (h) 2 *P. W.* 361.

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It is to be regretted, that a slip in the preparation of this codicil—(a slip by way of omission)—has rendered an argument on the testator's intention maintainable and necessary—has rendered it necessary to attend to the whole of the codicil from beginning to end. It is, however, less to be regretted in this, than in many other cases, because an attentive or even a slight consideration of the whole codicil renders it clear beyond a doubt, what was really the testator's meaning; namely, that the previous life estate given to his son should be abolished, in favour of those who were to come after, subject only to the express provision made by the codicil for his son's benefit. The appeal must be dismissed with costs.

The LORD JUSTICE TURNER.

The question in this case is, not whether an intention is to be collected in favour of the testator's son and heir (who requires no intention in his favour); but whether there is an intention in favour of the grandson. The question may be considered in two points of view; first, as regards the will; secondly, as regards the codicil. By the will, the estate is given upon trust for the testator's son for life; and, from and immediately after his decease, upon trust for his first and other sons in tail. These words may have one of two imports, either that the grandson was to take nothing till after the death of his father, or else merely to show the order of the limitations, through which the estate was to pass. I take the cases cited to establish the proposition, that, *prima facie*, these words are to be understood as denoting the order of succession of the limitations. Is there then anything in the will to lead to a different conclusion? I can see nothing. If *John Lainson* had died, there can be no doubt that the grandson would have come into

into possession immediately; and what difference does it make, whether the previous estate is removed by death or by revocation? The words of the codicil seem to me to confirm this view. It is the clear intention of the will to dispose of all the estate for the benefit of the testator's son, and his issue. The codicil does not at all alter this intention, but only changes the order of succession in which the devisees are to take. No doubt, a will might be drawn in such a way as to show an intention that the remainderman should not take till after the death of the first devisee; but there is nothing in this codicil to show such an intention. I agree that the appeal must be dismissed with costs.

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Nov. 14, 15,
18.

THIS was an appeal from the decision of the Master of the Rolls, in substance, refusing to decree a specific performance of an agreement for the transfer of fifty shares in a Prussian Gas Company, except on the terms of the Plaintiff fulfilling on his part a covenant for indemnity, contained in the same instrument with the agreement sought to be enforced.

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The rule that he who seeks equity must do equity, is restricted to an equity in respect of the subject-matter of the suit.

The agreement was contained in a deed of dissolution of partnership, dated the 3rd of *October* 1851. The deed

Where therefore in a deed of dissolution of partnership, one partner as-

signed certain foreign shares (which were recited to be transferable, as it was believed, by delivery), and covenanted for further assurance; and the other partner covenanted to indemnify the former against certain liabilities; and it afterwards appeared that the shares were not transferable by delivery, but required a formal act to complete the assignment:—*Held*, in a specific performance suit instituted by the assignee of the shares, that he was entitled to have the assignment completed, although there might in the meantime have been on his part a failure to perform the covenant of indemnity.

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deed recited that differences had arisen between parties thereto, that it had been agreed that the Defendant *Goldsmid* and another should make the assignment and assurances and enter into the covenants and agreements thereafter contained, and that, in consideration of their so doing, the Plaintiff *Gibson* and *John Grafton* should jointly enter into the releases and execute the demnity thereafter contained on their parts. It further recited that *John Grafton* and the Defendant *Goldsmid* (as such partners as therein mentioned) were possessors of various shares therein specified by their numbers, including fifty shares in the *Escheveiler Gas Company* and one hundred and seventy shares in the *Cologne Gas Company*. It then recited as follows "And whereas the said several shares hereinbefore named are, it is believed, transferred by delivery of the certificates and vouchers for the same." By the witnessing part of the deed *Grafton* and *Goldsmid* assigned to *Gibson* and *Grafton*, their executors, administrators and assigns their fifty shares in the *Escheveiler Gas Company* "together with all and all manner of benefit, interest, claim and demand of them the said *John Grafton* and *Edmund Elsdon Goldsmid* jointly and severally therein and the same to:" and *Goldsmid* thereby for himself, his heirs, executors and administrators, covenanted with *Gibson* and *John Grafton*, their heirs, executors, administrators and assigns, that he would, whenever thereto reasonably required, at the request, costs and charges of the parties requiring the same, make, do and execute all such further acts, deeds, matters and things that might be required as he lawfully could or might, or as should be in his power and ability, for the purpose of effectuating the transfers and assignments thereby made and for vesting the shares and other estates and effects thereby assigned in *Gibson* and *Grafton*. By another witnessing part *Gibson* and *Grafton*, in consideration of the premises

and of the assignment and transfer thereinbefore made to them by *Goldsmid*, covenanted to indemnify *Goldsmid*, his heirs, executors and administrators, and his and their estates and effects, of, from and against the copartnership, debts and liabilities of the several respective firms therein mentioned which were in subsistence and due and owing at the date of the agreement, and from and against all specialities which *Goldsmid* at any time theretofore had executed as a partner in the firms during the copartnership.

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Subsequently to the execution of the deed *Grafton's* interest in the *Escheveiler* shares became vested, by assignment, in *Gibson* the Plaintiff.

It was afterwards discovered that the shares were not transferable by delivery, but that a formal transfer was necessary. *Gibson* thereupon requested *Goldsmid* to make the requisite transfer in conformity with the terms of the covenant for further assurance, but *Goldsmid* declined unless *Gibson* would repay to him 250*l.*, which he alleged that he had been in the mean time obliged to pay in respect of a debt to which *Gibson's* covenant of indemnity extended.

The Plaintiff thereupon instituted this suit for the specific performance of the covenant for further assurance.

The Master of the Rolls, at the hearing, made a decree for an account of what had been paid or discharged by *Goldsmid* since the date of the indenture of *October* 1851 in respect of the liabilities of the partnership, and that the *Escheveiler* shares should be transferred to the Plaintiff upon payment of what had been paid by the Defendant in respect of the liabilities of the partnership

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and of the taxed costs of the suit. The case is reported below by Mr. *Beavan* (a).

From this decree the present appeal was brought.

Their Lordships directed the counsel in the first instance to assume the Plaintiff to be indebted to the Defendant on the covenant of indemnity, which was one of the points in dispute.

Mr. *Glasse* and Mr. *T. H. Terrell* for the Plaintiff.

The contract was complete in equity, and we only ask to have legal effect given to it by a formal act. That cannot depend upon the covenant to indemnify. The assignment of the shares now turns out to be formally incomplete, but was supposed to be complete at the time of the execution of the deed. Nothing was intended to be deferred or reserved. [The LORD JUSTICE KNIGHT BRUCE. Is not the question in the case as to the application of a maxim, not always easy to understand or apply, that he who seeks equity must do equity?] We submit that that maxim only applies to executory contracts; this contract was complete.

Mr. *R. Palmer* and Mr. *Waley*, for the Defendant.

It is not a question of condition precedent. If a person, not choosing to rely on his legal remedy, comes here for specific performance, he must show that he has performed the agreement so far as it had to be performed by him at the time of the application. The case is one of importance, involving questions which must frequently arise on dissolution deeds.

The

(a) Vol. 18, p. 584.

The following cases were referred to:—*Searle v. Law* (a); *Ward v. Audland* (b); *Hanson v. Keating* (c); *Rawson v. Samuel* (d); *Shish v. Foster* (e); *Meliorucchi v. Royal Exchange Assurance Company* (f); *Grand Junction Canal Company v. Dimes* (g); *Rawson v. Samuel* (h); *Francis's Maxims*, Maxim 1; *Fonblanque*, Vol. 1, p. 139.

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Mr. Glasse, in reply.

Judgment reserved.

The LORD JUSTICE KNIGHT BRUCE.

The question of which we have now to dispose is, whether,—upon the assumption against the Plaintiff for every present purpose, that the Defendant's allegation of his right, under the covenant of indemnity, contained on the Plaintiff's part in the deed of the 3rd of *October*, 1851, to recover by suit, against the Plaintiff, a present sum of money, is well founded,—the Plaintiff's title to relief in this cause is obstructed or affected by that circumstance, a question which ought, I conceive, to be answered in the Plaintiff's favour.

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The relief that he prays, so far as we are now dealing with it, is to compel the Defendant to do a formal act for the purpose of completing the Plaintiff's title to certain shares in a continental undertaking called the *Escheveiler* Company, which shares (at least the original) were expressed and meant to be assigned by the Defendant to the Plaintiff and Mr. *Grafton* by the deed of the 3rd of

October

(a) 15 *Sim.* 95.

(b) 8 *Beav.* 201.

(c) 4 *Hare*, 1.

(d) *Cr. & Ph.* 161.

(e) 1 *Ves. sen.* 88.

(f) 1 *Eq. Ca. Ab.* 8, pl. 8.

(g) 2 *Mac. & Gor.* 285.

(h) *Cr. & Ph.* 176.

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October 1851. And it must, I think, be taken to have been intended by the Plaintiff and Defendant, at the time of executing and in executing the deed, that, from the moment of its execution by them and Mr. *Grafton*, the shares should be placed in the absolute power of Mr. *Gibson* and Mr. *Grafton*, that they should thenceforth be the sole and absolute owners of them. It appears, however, that, according to the law or regulations by which the shares are governed, some act beyond the execution of the deed was necessary, or is considered—and probably with reason considered—to have been necessary in order to give, on the Continent, complete effect to that intention,—a formal act, which it is (as I have said) an object—is indeed the main if not the sole object—of the present suit to oblige the Defendant to do. He resists, because (as he alleges) the covenant on Mr. *Gibson's* part, which the deed contains to indemnify the Defendant against certain actual or supposed liabilities, has, with regard to another property, been broken, and because the breach must (he asserts) be cured and remedied before a decree can properly be made effectual against him.

The deed, an instrument somewhat artlessly prepared, though seeming to extend to a considerable variety of subjects, and to be not free from intricacy or complication in its provisions, is an indenture of nine parts, to which eight persons I think are expressed to be parties; and, so far as it can be material now to mention the contents particularly, runs thus—[His Lordship read the portions of the deed above set out.] Mr. *Grafton's* interest in the *Escheveiler* shares has become vested in Mr. *Gibson*, and was so when the bill was filed.

Now, with regard to the indemnity which the Defendant claims, he must, I conceive, be taken to have been, when they

They executed the deed, content to rely on the covenant of indemnity contained in the deed, and on the covenant only. The Defendant alleges against the Plaintiff, not any wrong or omission upon his part previous to the deed or contemporaneous with it, but a wrong of commission or omission done at a distinct or subsequent time, though in breach of a covenant contained on his part in the deed. This appears to me to form, neither legally nor equitably, an impediment in the way of the effectual assertion of his right to be placed in the position in which it was intended that he should, immediately upon the execution of the deed by himself and Mr. Goldsmid and Mr. Grafton, be placed; the Plaintiff having done all that it was then incumbent on him to do. By executing the deed, Mr. Gibson and Mr. Grafton paid the price for the shares. The Defendant contends the Plaintiff's position to be that of a party to a contract who, having broken or omitted to perform a material term of it on his side, sues the other for specific performance of that other's part of the agreement. But I do not accede to this. The Plaintiff agreed to give a covenant of indemnity: he did so. His subsequent breach of it, if he has broken it, forms no breach of the agreement to give it. His covenant of indemnity and the Defendant's covenant as to the shares are legally independent of each other, it is certain. Lien, equally, and set off, appear to me to be out of the case; and a rule perhaps sometimes misunderstood, perhaps less wide in meaning than in expression—the rule namely—that a Plaintiff coming for equity must do equity, is without application in the present instance, as I view the matter. That unity of subject, or connection between subjects, which calls it into operation, is here, I think, wanting; and the Defendant must be left to sue upon his claim for indemnity. He cannot effectually set it up in this cause, at least according to my opinion.

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I desire

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I desire to be understood, however, as not intimating what course it would, in my judgment, have been right to take if we had not been satisfied that in the transaction of *October* 1851 the understanding and meaning of the parties were that, from the time of the execution of the deed by the Plaintiff and Defendant and Mr. *Grafton*, the shares—the original *Escheveiler* shares—should at once and absolutely become the property of Mr. *Grafton* and the Plaintiff; or if the Plaintiff had, to the Defendant's damage, acted wrongfully in a point directly and immediately touching the shares the subject of pursuit.

The LORD JUSTICE TURNER.

The bill in this case is filed for the purpose of compelling the Defendant to do all such acts as may be necessary for transferring to the Plaintiff certain shares in the *Escheveiler* Company, which are mentioned in the bill.

The title of the Plaintiff rests upon a deed of the 3rd of *October* 1851, which had, for its object, to put an end to a partnership in which the Plaintiff and Defendant were concerned, and to arrange its affairs. And the deed contained a recital (which my learned brother has referred to), that the shares of the Company are it is believed transferred by delivery of the certificates or vouchers, and contains an assignment of those particular shares, and a covenant by the Defendant for further assurance, and by the Plaintiff a general covenant of indemnity against all the liabilities of the partnership.

The Defendant resists the Plaintiff's claim to have the transfer of the shares perfected upon this ground, that the Plaintiff is indebted to him upon the covenant of indemnity; he insists that the Plaintiff is not entitled

to

to call upon him to perfect the assignment of the shares, until he pays the debt.

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The Master of the Rolls has been of opinion, that this defence is well founded, and has accordingly made the following decree. [His Lordship read it.]

The appeal before us is from this decree. Upon the hearing of the appeal a question was raised, whether there is anything due to the Defendant upon the covenant of indemnity; but, upon the suggestion of my learned brother, it was agreed that that question should be postponed, and that the case should be first argued upon the point, whether, assuming the Plaintiff to be indebted to the Defendant upon the covenant of indemnity, the Defendant is entitled upon that ground to resist the Plaintiff's claim to have the assignment of the shares perfected by the Defendant.

The case was argued at the bar, and was rested by the Master of the Rolls in his judgment upon the ground that the Plaintiff seeking specific performance must perform his part of the contract. In effect, the judgment of the Master of the Rolls wholly rests upon the rule, that he who comes into equity must do equity. This is a rule, which is, no doubt, favoured by this Court, as its direct and immediate operation is to prevent multiplicity of suits, an evil which the Court is always anxious to avoid. But the rule, certainly, does not go so far as to entitle the Court arbitrarily to impose terms upon a Plaintiff, who may be driven to ask for its assistance. It is restricted in its operation, and the true meaning of it, as I apprehend, is this, that those who ask for the assistance of the Court must do justice as to the matters in respect of which that assistance is asked. Lord

Hardwicke,

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Hardwicke, speaking of the rule in *Shish v. Foster* (a), thus expresses himself:—"The rule does not hold throughout, so as to tack things together, which are independent in their own nature." Sir *John Leach*, in *Whitaker v. Hall* (b), distinctly states, that the rule applies only to equities arising out of the same transaction; and, without mentioning the other cases, of which there are many, it is sufficient to refer to the case of *Hanson v. Keating* (c), in which Sir *James Wigram* has summed up the law upon the point with great accuracy. He there says, "The argument in this case, for the Defendant *Mrs. Keating*, was founded upon the well established rule of this Court, that the Plaintiff who would have equity must do equity,—a rule by which, properly understood, it is at all times satisfactory to me to be bound. But it is a rule which, as it was used in the argument of this case, takes for granted the whole question in dispute. The rule, as I have often had occasion to observe, cannot per se decide what terms the Court should impose upon the Plaintiff as the price of the decree it gives him. It decides in the abstract, that the Court, giving the Plaintiff the relief to which he is entitled, will do so only upon the terms of his submitting to give the Defendant such corresponding rights (if any) as he also may be entitled to in respect of the subject matter of the suit;—what these rights are must be determined *aliunde* by strict rules of law, and not by any arbitrary determination of the Court. The rule, in short, merely raises the question, what those terms (if any) should be. If, for example, a Plaintiff seeks an account against a Defendant, the Court will require the Plaintiff to do equity, by submitting himself to account in the same matter in which

(a) 1 *Ves. sen.* 88.

(b) 1 *Gly. & J.* 213.

(c) 4 *Hare*, 1.

which he asks an account;—the reason of which is, that the Court does not take accounts partially, and perhaps ineffectually, but requires that the whole subject be once for all settled between the parties. It is only (I may observe as a general rule) to the one matter, which is the subject of a given suit, that the rule applies (*Whitaker v. Hall* (a)), and not to distinct matters pending between the same parties. So, in the case of a bill for specific performance, the Court will give the purchaser his conveyance, provided he will fulfil his part of the contract by paying the purchase-money; and, *e converso*, if the vendor were plaintiff, the Court will assist him, only upon condition of his doing equity by conveying to the purchaser the subject of the contract upon receiving the purchase-money. In this, as in the former case, the Court will execute the matter which is the subject of the suit wholly, and not partially. So, if a bill be filed by the obligor in an usurious bond, to be relieved against it, the Court, in a proper case, will cancel the bond, but only upon terms of the obligor refunding to the obligee the money actually advanced. The reason is analogous to that in the previous cases. The equity of the obligor is to have the entire transaction rescinded. The Court will do this, so as to remit both parties to their original positions: it will not relieve the obligor from his liability, leaving him possession of the fruits of the illegal transaction he complains of. I know of no case which cannot be explained upon this or analogous reasoning; and my opinion is, that the Court can never lawfully impose merely arbitrary conditions upon a Plaintiff, only because he stands in that position upon the record, but can only require him to give the Defendant that which by the law of the Court, independently of the mere position of the party on the record, is the right of the Defendant in respect

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(a) 1 *Gly. & J.* 213.

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respect of the subject of the suit. A party, in short, does not by becoming Plaintiff in equity give up any of his rights, or submit those rights to the arbitrary disposition of the Court. He submits only to give the Defendant his rights in respect of the subject matter of the suit, on condition of the Plaintiff obtaining his own."

In this exposition of the law upon the subject I fully agree, and the true question, therefore, in this case, seems to me to be, whether, upon the construction of this deed, the covenant for further assurance and the covenant for indemnity are to be taken as separate and distinct or as connected together, so that the performance of the one was to be dependent upon the fulfilment of the other. I have examined the deed, in this point of view, and am fully satisfied that it was not intended by the parties that the covenants should be thus taken in connection. The recital, to which I have referred, seems to me alone to be conclusive on the point. It shews that the parties contemplated that the whole interest in the shares would pass by the assignment, and the shares, therefore, must have been intended to pass immediately; but the demand upon the covenant of indemnity must, from its nature, be future and contingent. My opinion, therefore, is, that the rule, that he who comes into equity must do equity, does not apply to this case, and, I think, that the case is not one to which the rule could advantageously be extended. The extension of the rule to such a case as the present would, as it seems to me, be attended with the greatest inconvenience. If the rule be applied to the alleged existing liability on the covenant, it must, I think, equally prevail as to the other liabilities from time to time arising, and, if the existence of liabilities furnishes a ground for this defence, I do not see how an inquiry whether liabilities exist could, under any circumstances, be refused. Again, the effect of applying the rule to this

case

case would be to bring into this Court all legal questions arising upon the covenant of indemnity. It was argued, for the Defendant, that the rule ought to apply as to liabilities already arisen upon the covenant, or which may arise upon it, pending the suit, without reference to liabilities subsequently arising; but this does not seem to me to be consistent with the ordinary principles of the Court. It is not the habit of the Court to execute covenants partially, and if the Defendant's argument be good as to liabilities which have arisen, I think it would follow that an account must be taken of all the liabilities, and all must be satisfied or provided for before the Plaintiff could compel a transfer. It was also argued, on the part of the Defendant, that, if the liabilities upon the covenant had been incurred in respect of the shares sought to be transferred, the Court certainly would not have compelled the transfer until the liabilities were satisfied; but this argument has no application to the case. In the event suggested the liabilities would have been incurred in respect of the subject matter, and the rule in question would, therefore, clearly apply. Upon the whole, therefore, my opinion is, that this decree cannot be maintained, and that there must be a decree for the execution of the covenant for further assurance in the terms prayed by the bill.

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Trustees of a bond debt, on the bankruptcy of the obligor, concurred with his other creditors in consenting to the fiat being annulled on the payment of a composition. On the transaction being impeached some years afterwards by *cestuis que trustent*, who were under disabilities, Held (confirming the decision of Vice-Chancellor *Kindersley*, *dubitante*, Lord Justice *Turner*), that the trustees were liable to make good the full amount of the debt; it being impossible to show that the bankrupt would have obtained his certificate, or that the debt might not have been recovered in full.

WILES v. GRESHAM.

THIS was an appeal from a decision of the Vice-Chancellor *Kindersley*, holding the Appellants liable for a breach of trust in not getting in a bond debt. The case is reported below in the 2nd volume of Mr. *Dewry's Reports* (a), where the facts are fully stated. The following is a short summary of them.

By a settlement executed on the marriage of the Plaintiff, Mrs. *Dorothy Wiles*, with Mr. *William Wiles*, one of the Defendants, after reciting an agreement by the intended husband to give a bond to secure the payment of 2000*l.* at or before the expiration of six months from the marriage, it was declared, that the trustees should hold the bond debt upon trust, with the consent in writing of *Dorothy Wiles* and *William Wiles*, or the survivor of them; and after the decease of such survivor, at the discretion of the trustees or trustee for the time being, to permit the 2000*l.* to remain in its then actual state of investment and security; or with such consent or at such discretion as aforesaid, to call in and receive the same when and as the same should be due and payable, or sooner in case the person or persons for the time being liable to pay the same should think proper to pay the same or any part thereof; and, with such consent and at such discretion as aforesaid, invest the moneys to arise from such calling in and receipt in the names of the trustees, in the stocks or public funds of *Great Britain*, or upon government or real securities, at interest, with power to alter and vary the same; and it

(a) Page 258.

it was declared, that the trustees should stand possessed of the moneys received by the bond and interest, and the stocks, funds and securities upon which the same should be invested, and the dividends and annual produce thereof, upon trust during the joint lives of *Dorothy Wiles* and *William Wiles*, for the separate use of *Dorothy Wiles*, without power of anticipation; and after the decease of one of them in trust for the survivor and her or his assigns for life; and after the decease of the survivor, in trust for the child or children of *William Wiles* by *Dorothy Wiles*, in manner therein mentioned.

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No consent was given to the trustees calling in the 2000*l.*, and they permitted it to remain upon the security of the bond till the 8th of *August* 1836, when the husband became bankrupt, and they proved under the bankruptcy for 2000*l.* and an arrear of interest.

In *May* 1837, the fiat was annulled, with the consent of the creditors, including the trustees, a composition of 16*s.* 6*d.* in the pound being guaranteed to be paid, and having been paid to all the creditors, except the trustees, who still left the composition money in the hands of the husband.

On the 14th of *March* 1838, the husband and wife signed and delivered to the trustees the following memorandum:—

“We the undersigned, *W. Wiles* and *Dorothy* his wife, do hereby declare, that the sum of 2000*l.*, secured to be repaid to the trustees of the settlement made on our marriage by the bond of me *W. Wiles*, has been permitted to remain in its present state of actual investment upon the security of the said bond, with our consent, and we do hereby request of you, the present trustees of our marriage settlement, to allow the said sum of 2000*l.*
still

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still to remain in its present state of investment upon the security of the same bond. 14th *March* 1838."

In *January* 1847 the husband again became bankrupt.

The suit was instituted by the wife, and the children of the marriage, by a next friend, against the surviving trustee, and the executors of the two deceased trustees of the settlement, for a declaration, that a breach of trust had been committed, and consequent relief. The suit extended to other funds, but the question on the appeal was as to the 2000*l.* only, the whole of which the Vice-Chancellor held that the trustees were liable to make good.

The surviving trustee, and the representatives of the deceased trustees, appealed.

Mr. *Glasse* and Mr. *Fane*, for the surviving trustee.

Mr. *Baily* and Mr. *Bush*, for the representatives of the deceased trustees.

There was no breach of trust in not calling in the 2,000*l.*, as there never was a written consent for that purpose, as was required by the settlement. With respect to the composition of 16*s.* 6*d.* in the pound, the same argument applies, and as to both, the memorandum of 1838 was a sufficient consent to the fund remaining outstanding.

They referred to *Boss v. Godsall* (a); *Sowden v. Sowden* (b); *Campion v. Cotton* (c).

Mr.

(a) 1 *Y. & C. C. C.* 617. *Cox*, 165.
 (b) 1 *Bro. C. C.* 582, n., 1 (c) 17 *Ves.* 263.

Mr. *Hawkins*, for the husband.

Their Lordships only desired to hear the Plaintiff's counsel on the question, whether the trustees were to be charged with the 2,000*l.* or the composition of 16*s.* 6*d.* in the pound.

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Mr. *Swanston* and Mr. *J. H. Palmer*, for the Plaintiffs.

The trustees had no authority to accept the composition. In order to support the transaction, which was beyond their authority, they must show that no more could have been obtained. They have not shown this.

Mr. *Glasse*, in reply.

The facts of the case show clearly, that no more than 16*s.* 6*d.* in the pound could have been recovered; and, therefore, the trustees are liable to no greater extent; *Maitland v. Bateman* (a).

The LORD JUSTICE KNIGHT BRUCE.

If, by the prosecution of the first bankruptcy, the whole of the 2,000*l.* could have been obtained, it is clear that the trustees, by consenting to the order which prevented the bankruptcy from being prosecuted, made themselves liable for the whole sum. But it is said that payment of the 2,000*l.* could not have been obtained. There is, however, enough on the evidence to enable the Court to say, that the trustees ought not to be exonerated from any part of the 2,000*l.*, without an inquiry being first directed as to what could have been obtained. Such an inquiry would be difficult, troublesome and expensive; but that ought not to deter the Court from directing it, if necessary for the ends of justice. There is, however, a further consideration. It is impossible

(a) 8 *Jur.* 926.

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possible now to say, whether the husband would ever have obtained his certificate under the first bankruptcy had it been prosecuted. If he had failed to obtain it, his future property would have been liable to the payment of his debts, including the present demand. It thus becomes impossible to show that payment of the whole amount might not ultimately have been obtained. I regret the conclusion to which I am obliged to come, as the case is one of considerable hardship; but it would, I think, be contravening the principles of the Court, not to decide that the trustees are liable for the whole 2,000*l*.

The LORD JUSTICE TURNER.

As the opinion of my learned brother is in accordance with the decision of the Vice-Chancellor, it is not necessary for me to express any opinion upon it; but at the present moment I feel great doubt, whether the trustees should be charged with the whole 2,000*l*. without further inquiry.

Appeal dismissed; but without costs.



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POMFRET v. PERRING.

THIS was an appeal from a part of a decree of the Master of the Rolls, deciding that a testamentary appointment affected funds already appointed, subject to a power of revocation and new appointment. The case is reported below, in the 18th volume of Mr. *Beavan's Reports* (a). The following statement will be found sufficient to explain the point decided upon the appeal.

By a settlement, dated the 30th of *April* 1799, and made on the marriage of *Philip Perring* and *Sarah Jackson*, two sums of 2,000*l.* and 3,000*l.* stock were settled in trust, after the death of the survivor of the intended husband and wife, for all and every or such one or more of the children of the marriage, as the intended husband should by deed or will appoint, and in default of such appointment, as the intended wife, if she should be the survivor, should by deed or will appoint; and in default of appointment for the benefit of the children of the marriage, as therein mentioned. The settlement contained a covenant that as soon as a sum of 1,500*l.*, secured by a covenant of the intended wife's father, should be laid out in land, such land should be re-limited to uses conferring a life estate in the intended husband, with remainder to the intended wife for life, with remainder to the children, as the husband should appoint, and, in default of such appointment, as the wife, if she

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An appointment expressed to be made in exercise of every power enabling the appointor, does not extend to property which the appointor cannot appoint without the exercise of a power of revocation, if there be other property to which the appointment can apply.

Therefore, where the donee of a power under a settlement to be exercised by deed or will, partially exercised it by deed, reserving a power of revocation, and afterwards by her will, by virtue of every power contained in the settlement,

should

(a) Page 618.

or "otherwise howsoever," appointed all the real and personal estate which under the settlement, or otherwise, she had power to appoint:—*Held*, that the will operated on the unappointed part only, and was not an exercise of the power of revocation and new appointment.

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should survive, should appoint. There were also covenants by the father of the intended wife, and by the husband, for payment of 700*l.* and 5,000*l.* respectively after their respective deceases, and declarations of trust subjecting those sums to a power of appointment in the wife if she survived the husband, similar to the power with respect to the 2,000*l.* and 3,000*l.*

By his will, dated 13th of *November* 1835, *Thomas Jackson* (the father of *Mrs. Perring*), after giving certain legacies, devised and bequeathed all his real and the residue of his personal estate to trustees, in trust to sell and convert, and invest the produce in the public stocks or funds or government or real securities, and pay the dividends and interest thereof, and the income of his real and personal estate till converted, to his daughter *Mrs. Perring* for life, for her separate use, without power of anticipation; and after her decease, to divide the capital among such of her children, and the issue of any child or children, in such shares, and subject to such limitations over, and with or without power of revocation, as she should by deed or will appoint; and in default of appointment, and as to so much of the trust funds, and of the beneficial interest therein, whereof no such appointment should be made, in trust for all the children of *Mrs. Perring*, share and share alike.

Mr. Perring died without executing the power, and afterwards, on the 15th of *November* 1847, *Mrs. Perring* executed a deed poll, whereby, after reciting the will of her father, and the marriage of her youngest child *Blanche* with *Edward Butler*, and that no settlement had been executed on the marriage, she appointed one-fifth part of the residuary property under the will of her father, over which his will gave her a power of appointment, to *Mrs. Butler* for life, for her separate use, with

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out power of anticipation, and after her decease for the benefit of her children as therein mentioned; and if there should be no issue of Mrs. *Butler* living at Mrs. *Butler's* decease, then she appointed the said fifth part in trust for the children of her son *Jackson Perring* deceased, and her other three then surviving children. The deed also contained a proviso that in case Mrs. *Perring* should not thereafter direct to the contrary, Mrs. *Butler* or her issue should not be entitled to any further share of the residuary property under Mr. *Jackson's* will; Mrs. *Perring* thereby declaring her intention to be that the other four-fifths, over which she had not exercised her power of appointment, should after her decease devolve equally upon her children *Charles Perring*, *Claude Perring* and *Ellen Goodchild*, or their respective representatives, and the personal representative of *Jackson Perring*, such last-mentioned representative taking the share only which the said *Jackson Perring* would have taken had he been living. And Mrs. *Perring* thereby reserved to herself a power of revoking, by deed or will, the appointment of the one-fifth thereby made, and to make any other direction or appointment or disposition of the same.

By a deed of the 8th of *May* 1852, it was declared that the lands, to be purchased with the 1,500*l.*, mentioned in the settlement of 1799 should be conveyed to the uses declared by that settlement, or such of them as were then subsisting.


In 1849 *Claude Perring* died without having been married.

Mrs. *Perring* made her will, dated the 10th of *May* 1852, as follows :—

“ I give, devise and bequeath, and by virtue of every
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power or authority whatsoever by an indenture bearing date on or about the 30th day of *April* 1799," &c., "and by an indenture dated the 8th day of this present month, or either of such indentures, given or limited to me, or otherwise howsoever enabling me, do by this my will direct, limit and appoint all and singular the stock, sums of money, messuages, hereditaments and real and personal estate whatsoever, which I may at my decease be possessed of or entitled to, or, under or by virtue of the powers contained in the said indenture of settlement or otherwise, have power to appoint, save and except the sum of 20*l.*, part of the sum of 5,000*l.*, in the said indenture of settlement covenanted to be paid (which I expressly allow to devolve unappointed by me), in manner following (that is to say), two equal fourth parts of the same respectively to *Charles Perring*, one-fourth to my daughter *Ellen Goodchild*, and the remaining one-fourth to my daughter *Blanche Butler*, for her separate use," &c.

Mrs. *Perring* died on the 9th of *February* 1853.

The Master of the Rolls made a decree, declaring that the will of Mrs. *Perring* operated as an exercise of the power of appointment reserved to her by her father's will, as well as of the power reserved by the settlement and the deed of the 8th of *May* 1852, and that the appointment made by the deed poll of the 15th of *November* 1847 was revoked by Mrs. *Perring's* will, and that the whole of *Thomas Jackson's* residuary estate passed by Mrs. *Perring's* will, except the sum of 20*l.* therein mentioned.

Mr. and Mrs. *Butler* appealed from the two latter declarations.

Mr. —

Mr. *R. Palmer* and Mr. *Jolliffe*, in support of the appeal.

Their Lordships desired, first, to hear the counsel for the Respondents.

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Mr. *Roupell* and Mr. *Druce*, for the Respondents.

The testatrix had three distinct powers when she made her will;—the power to appoint under the original settlement and the deed of the 8th of *May*; the power to appoint the unappointed interests under her father's will, and the power of new appointment reserved under the former appointment. Now the will in question purports to execute the powers given by the original settlement, or otherwise howsoever. These words extend to all the powers.

They referred to *Trollope v. Linton* (a); *Bailey v. Lloyd* (b), and *Harvey v. Stracey* (c).

Mr. *Southgate*, for other parties.

Mr. *R. Palmer*, in reply.

The words, "or otherwise have power to appoint," do not operate as the exercise of a power of revocation and new appointment, there being powers of appointment to which the words, in their ordinary and correct signification, properly apply; *Scrope's Case* (d); *Degg v. Lord Macclesfield* (e). In *Brodie v. Barry* (f), and *Maxwell v. Maxwell* (g), it was held, that an instrument not properly officious in affecting lands in *Scotland*, ought not

(a) 1 *Sim. & St.* 477.

(b) 5 *Russ.* 330.

(c) 1 *Drew.* 73.

(d) 10 *Rep.* 143 b.

(e) *Mucnaghten's Select Cases*, 44.

(f) 2 *Ves. & B.* 127.

(g) 2 *De G., M. & G.* 705.



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not to be applied to them, there being others, with respect to which it was properly officious. If the construction contended for is a sound one, it would apply to the Wills Act, which would, on that construction, have a most injurious effect, for a will would then destroy all settlements in which powers of revocation had been reserved. Such words as the present cannot extend without special circumstances to a power which can only be exercised by the previous exercise of a power of revocation.

*The LORD JUSTICE KNIGHT BRUCE.*

I apprehend that it is not according to the true import or correct interpretation of the words used by the testatrix to say, that they exhibit of themselves an intention to exercise a power of revocation. But if the will shows an intention to have existed, which, without so construing them, cannot be effectuated, they may certainly be so construed. I conceive, however, that the will here does not show such an intention. Every word of the instrument may, in my opinion, be satisfied, without ascribing to the testatrix any idea of dealing with the power of revocation or the property subjected to it.

*The LORD JUSTICE TURNER.*

The cases cited on behalf of the Respondents are very distinguishable from the present. Here an actual appointment has been made with a power of revocation, and that appointment was to be undone, before the power of new appointment would arise. To show that a power of this description has been exercised, it is not, I think, enough to show an intention to appoint; an intention to revoke the former appointment ought, I think, also to be shown. The principles acted on in other cases, with respect

respect to the exercise of powers, seem to me to apply to this. If a person has an interest in one subject, and a power over another, and uses general words of disposition only, those words will not operate as an exercise of the power. It is otherwise when he has no interest, but only a power. The same principle must, I think, apply to a case where a person has a power of appointment, and also a power of revocation and new appointment. The general words of appointment ought not to be held to be an exercise of the power of revocation. If there was no power except one of revocation and new appointment, it would be different, and the general words would be then held to be an exercise of that power. I think it clear that an intention must be shown to revoke and undo what has been already done. I cannot find that intention here.

I concur with my learned brother in thinking that the appeal on this point must be allowed.

Declare, that the power of revocation was not exercised by the will of *Sarah Perring*, and vary decree accordingly. Costs out of estate.

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In making a settlement of property belonging to a wife, the Court looks not only to the portions of her fortune which the husband may have already received, but to all the circumstances of the case, and particularly to the husband's conduct.

Where therefore a widow about to marry again assigned all her property except a life interest in the income of 10,000*l.* Consols, to which she was entitled under a former settlement, in trust for her separate use during the coverture, and afterwards in trust for herself, if she survived, or, if not, for the second husband,

and it appeared that he had married her from interested motives only, and there had been a divorce *à mensa et thoro* for adultery on his part, the Court settled the whole income of the 10,000*l.* Consols on the wife, irrespectively of the question whether it had been by mistake or otherwise left out of settlement.

BARROW v. BARROW.

THIS was an appeal of the Plaintiff, a married woman, from the decision of the Master of the Rolls, directing one-half only of an annual sum to which the Plaintiff was entitled to be settled for her separate use.

The short facts of the case, as stated in the judgment of Lord Justice *Turner*, were as follows:—By the settlement made upon the marriage of *George Combes* and *Jane Dell*, dated the 27th of *February* 1839, it was declared, that the sum of 5,000*l.*, 3*l.* per Cent. Consolidated Bank Annuities, vested in the trustees of the settlement, should be held upon trust, during the joint lives of *George Combes* and *Jane Dell*, for the separate use of *Jane Dell* without power of anticipation, and, in the event of *Jane Dell* surviving *George Coombes*, then after his decease upon trust to permit *Jane Dell* during the remainder of her life to receive the dividends for her own absolute use and benefit, and, subject to these trusts, upon trust for the children of the marriage, with power to *Jane Dell* to appoint the fund by will, in the event of there being no children of the marriage. By a deed poll, dated the 3rd of *August* 1839, a further sum of 5,000*l.* Consols was settled upon the same trusts.

George Combes died in the year 1847, leaving his wife *Jane Combes* surviving, and there was no issue of the marriage, so that upon his death, the trust for the separate use of *Jane Combes* determined, and she be-

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came entitled to the dividends of the 10,000*l.* Consols, during the remainder of her life, discharged from the trust for her separate use. She also became entitled to other property under the will of *George Combes*.

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On the 30th of *July* 1850, *Jane Combes* married *Samuel Howship Barrow*, and by the settlement made upon this marriage, dated the 29th of *July* 1850, the property to which she was entitled under the will of her first husband, together with some other property to which she was entitled, was settled upon trusts for her separate use during the joint lives of herself and her husband, and in the event of her surviving him, in trust for her absolutely; but in the event of his surviving her, in trust for him absolutely. This settlement also comprised a policy of insurance for 1,000*l.* effected by *S. H. Barrow* upon his life, and which was settled upon the same trusts, but the settlement did not in any manner refer to or affect the interest of the wife in the 10,000*l.* Consols, which was subject to the trusts of the settlement upon her first marriage.

The marriage of Mr. and Mrs. *Barrow* having taken place on the 30th of *July* 1850, they immediately went abroad and did not return to this country until the 16th of *September* following. They soon afterwards, and on the 19th of *September* 1850, took up their residence at a house in *Torrington Square*, where Mrs. *Barrow* had resided before her second marriage, and they continued to reside there together until the 28th of *September* 1850, when Mrs. *Barrow* left the house. She had not since cohabited with Mr. *Barrow*; and in the month of *February* 1852, she instituted a suit against him in the Consistory Court of *London* for a divorce, upon the ground of adultery and cruelty, in which suit a sentence
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of divorce upon the ground of adultery in *Mr. Barrow* was pronounced against him on the 14th of *July* 1852.

In this state of circumstances, two bills were filed in this Court, one by *Mr. Barrow*, seeking to recover the dividends on the 10,000*l.* Consols, subject to the trusts of the settlement made upon the first marriage, the other by *Mrs. Barrow*, seeking to rectify the settlement by making it extend to the dividends of the 10,000*l.*, on the ground that it was executed under the full belief on the part of the Plaintiff that those dividends were effectually settled by the first settlement to her separate use in the event of a second marriage—a belief which she alleged to have been known to exist and to be erroneous by her second husband. In the alternative, the bill sought to have the whole of the income settled upon her. The first suit was not prosecuted, but in the second suit (that instituted by *Mrs. Barrow*) a great deal of evidence was gone into both with a view to rectifying the settlement on the second marriage, so as to include *Mrs. Barrow's* life interest in the 10,000*l.* Consols, and also with reference to the conduct of *Mr. and Mrs. Barrow*, with a view to the question as to *Mrs. Barrow's* right to a settlement out of the income of the Consols, supposing her not to succeed in her case for rectifying the settlement.

The second of these causes came on for hearing before the Master of the Rolls in regular course, and, by arrangement of the parties, the first cause was heard with it. The Master of the Rolls made a decree in both the causes, declaring the Plaintiff entitled to half of the dividends of the 10,000*l.* with consequential directions, and giving no costs on either side. His Honor's judgment is reported in the 18th volume of *Mr. Beavan's Reports*, page 529.

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The *Solicitor-General*, Mr. R. Palmer and Mr. Walford, in support of the appeal.

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They referred to *Gilchrist v. Cator* (a); *Scott v. Spashett* (b); *Dunkley v. Dunkley* (c).

Mr. Willcock and Mr. W. Forster, for the Defendant Barrow.

Mr. Lloyd, Mr. Follett, Mr. J. W. Bovill, Mr. G. L. Russell, Mr. G. M. Giffard and Mr. Englehart, for the other parties.

The *Solicitor-General*, in reply.

Judgment reserved.

The LORD JUSTICE KNIGHT BRUCE.

December 9.

These and two other suits are the fruit of an alliance between a solicitor and a widow, who, for the first sixty days of their married life, namely, from the 30th of *July* to the 28th of *September* 1850, lived as well as quarrelled together, but at the end of that period parted, exchanging a state of conflict which, though continual, was merely domestic, for the more conspicuous, more disciplined and more effectual warfare of *Lincoln's Inn* and *Doctors' Commons*. They are now here claiming one against the other—he, by force of the marriage, she, notwithstanding the marriage, her life interest in the dividends of a sum of 10,000*l.*, 3*l.* per Cent. Consolidated Annuities, which sum, producing of course 300*l.* a year, was settled upon her for life, with a power of testamentary appointment over the capital, by a settlement made on her former

(a) 1 *De G. & Sm.* 188.

(b) 3 *Mac. & Gor.* 599.

(c) 2 *De G., Mac. & Gor.*

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former marriage with Mr. *Combes* in 1839, and another deed of that year.

The dispute is of this nature. There was a settlement made on the marriage of 1850. It did not, however, comprise or affect the income of the 10,000*l.* Consols or any part of it, though comprising and securing to the lady's separate use the revenue of all, or nearly all, (but I believe substantially the whole of) her other property, including even the enjoyment of her furniture. This she maintains was an error of omission. She asserts the agreement between herself and Mr. *Barrow*, on the faith of which she married him, to have been that all her property should be settled to her separate use. She alleges, that she was led by him and her solicitor Mr. *Fisher*, or by one of them, to believe, and accordingly did erroneously believe, that the income of the 10,000*l.* Consols stood already, by means of one or both of the deeds of 1839, secured to her separate use for her life, as against any husband whom she might, after her first husband's decease, marry, independently of the agreement or consent of any such subsequent husband, and, consequently, without any necessity or occasion for including that subject in the marriage-settlement of 1850. She says that, therefore, and for no other reason, it was not included in that settlement—that she is now entitled to have the agreement (on the faith of which she became, as she asserts, Mr. *Barrow's* wife) performed, so far as their marriage-settlement has not executed it—that if for want of sufficient evidence or otherwise, there is any difficulty in the way of obtaining her wishes, on the footing of express agreement, the knowledge, representations and conduct of Mr. *Barrow* on the subject of the income of the 10,000*l.* Consols before their marriage were such as to preclude him (independently of express agreement) from contending successfully in a Court of Equity,

Equity, that she is not entitled for their joint lives to that income for her separate use, but that, failing as to both grounds, she is still entitled against him to a settlement of or out of the dividends of the 10,000*l.* Consols; and, upon a just view of the facts and circumstances of the case, and the principles and practice of a Court of Equity, to have the whole of those dividends settled on her for her separate use during their joint lives.

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To no part of all this does the husband assent, unless possibly to her right, independently of anything that took place before their marriage, to some settlement out of the dividends. He says that the deed of 1850 accurately and fully executes the entire agreement, unless so far (if at all) as the deed is too favourable to her; that his conduct before the marriage was in every respect fair and unobjectionable, so far as property was concerned, but that, were the case otherwise, the bill filed by her is so framed as to exclude any title to relief not on the ground of mere contract. He claims, accordingly, the whole dividends for himself during his wife's life, or, at least, during their joint lives, subject only to such (if any) right to a settlement as, independently of what took place previously to their marriage, she may have; and as to this, the Master of the Rolls, by his decree, having declined to deal with the dividends on the ground of antenuptial contract or antenuptial conduct, and having settled on the lady half, but only half, of the dividends for her separate use, leaving the other half to him during her life, or during their joint lives, he seems content with that disposition, which the lady is very far from being. She has accordingly reopened the entire controversy by the appeal, that (very fully argued in *November* last) is now to be determined so far as the Court of Chancery is concerned.

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I may here observe, that Mr. *Barrow*, having in 1850 effected a policy of insurance on his life for 1,000*l.*, which the deed of 1850 settles and binds him personally to keep up, Mrs. *Barrow*, by her counsel at the bar, has expressed her willingness, and submitted, that in the event of her success in any one of her contentions, the dividends of the 10,000*l.* Consols shall be subjected to paying, during their joint lives, the premium on the policy (not exceeding its present amount of 24*l.* 15*s.* per annum), from the time of the first and only payment made by him ; she is also willing and has submitted to be restrained from anticipation in respect of the dividends of the stock. Further it may not be superfluous to notice, that (with a view especially to her case for a settlement, without regard to her allegations of antenuptial contract, of fraud, and of representation), Mr. *Barrow*, in the presence of his counsel, was offered by us the opportunity of being again examined, and adducing further evidence before us, or at least of applying for the purpose—an opportunity not accepted. These things being so, it is now right to consider with some degree of particularity a portion at least of the facts proved.

The courtship between Mr. *Barrow* and Mrs. *Combes* began not much if at all earlier than the year of their marriage, as to which his depositions contain a passage, that in point of accuracy may be questionable, but in point of gallantry can scarcely be so, namely, “ I did not begin to court her but she began to court me.” And he thus (perhaps with equal gallantry) speaks, as a witness, of their ages, “ I was twenty-nine years old when I married her, and when I married her she acknowledged to be forty-five years old, but I believe she was more.” Certainly, in 1850, she had achieved more than two and thirty years, but was without a family and was enjoying a net income under 800*l.*, but not under 600*l.* if under
 700*l.*

700*l.* per annum, of which her equitable life interest in the 10,000*l.* Consols formed a part. She had, I believe, become a widow in 1847. Her present husband and opponent, when he accepted, or was accepted by her, and when they married, was a practising solicitor, possessing, as it seems, little, if any, private fortune, but a bachelor; yet, though a bachelor, versed somewhat in the ways of women, as having, at least, eight living children by three living mothers, a combination of circumstances, which, known to Mrs. *Combes* when she resolved to marry him, was not viewed by her as uncommendatory of the proposed connection.

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Seldom on the whole can a couple before marriage have laboured so diligently to secure an unpeaceable life, while, after it, we find them fresh from church handselling the wedding-day by a testamentary controversy. For, under the marriage-settlement of the evening previous, as well as the deeds of 1839, she had powers of appointment by will; and a will, in exercise of them, having been prepared for her overnight by the bridegroom, the nuptial festivities are terminated by this remembrancer of death, which they retire with a clergyman to consider in private, when, the paper or part of it being read, she observes, that it bestows on her consort a very substantial legacy, namely, 5,000*l.* To this, as diminishing materially a provision made by it in favour of the eight children of the ladies of the latter (for whom, with no common generosity, she had certainly intended to provide), the client demurs, and a debate follows, which, after proceeding some way, was adjourned, and the bridegroom and still intestate bride drive from *Davies Street* (where the breakfast was had) to her own house in one of the eastern squares. There a warm interchange of sentiments ensues, which they both call an altercation—she in stronger terms than he uses—the sub-

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ject being the 5000*l.* legacy. But the lady after a time stops the argument by acquiescing, and accordingly signs, publishes and declares the instrument testamentarily. Two servants attest as witnesses; and, this inauguration accomplished, the bridegroom and his testatrix set out for *France* and *Italy* on a honeymoon tour, not altogether a halcyon one, but proving, in truth, an untoward expedition, in which, not they alone, but their companion, the will, also suffers. For, in an affair at *Pisa*, where for some time their quarters were, the lady appears to have torn it piecemeal, *animo* (as lawyers say) *cancellandi*. The husband seems to have collected the bits, which are produced here from his custody, but in a state of conglutination and cohesion absolutely disavowed by her, and, necessarily, I apprehend, to be ascribed to him. In *September* 1850, the tour and cohabitation end, and soon the lady seeks, and in *July* 1852 obtains, in the Spiritual Court, a divorce from bed and board on the ground of the gentleman's adultery, a charge not controverted or resisted by him. The sentence appears likely to remain, as it now is, in force, their cohabitation having not been renewed since *September* 1850. By the sentence alimony was not given to Mrs. *Barrow*, nor has she any. Her husband may be able or unable to contribute from resources of his own to her maintenance. This point seems not clear; but it is clear that he does not do so, nor has he, I collect, done so at any time since the marriage, unless, possibly, to some extent, while they were together during its first sixty days. He has probably, indeed, none but professional income, and it is not discreditable to him to observe, that he seems not disposed to abandon to destitution the families by which he has (however irregularly) surrounded himself. The utmost extent of his wife's income I have stated, an income which must have suffered, and must still probably suffer, under the quadruple litigation consequent on their differences. She cannot now, independently

pendently of the dividends of the 10,000*l.* Consols, have 450*l.* per annum clear. When she married him she was living in ease and comfort if not affluence. It is true, however, that one, at least, of the calculations, on which, in uniting themselves, they deliberately proceeded, has not been disappointed—she has no offspring. He has settled nothing upon her, except (if it is an exception) the covenant to insure his life, broken and set at naught by him ever since the marriage. The adultery proved against him is with one of the three concubines mentioned already, who are nominally specified in the will of the wedding-day, and the previous letter.

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[After stating other details of the case, his Lordship proceeded]—

Nor is it to be forgotten, that, independently of adultery, and without pressing anything against Mr. *Barrow*, his behaviour to his wife since their marriage (whatever her store or lack of wisdom or of temper) has been, in more than one instance, not only rough and harsh, but possibly something more.

I have now described (so far as I think in any respect necessary) what is the condition of circumstances—what the ungracious concourse of events—in which we have Mr. *Barrow* here contending for the right to appropriate to his exclusive use a considerable portion of his wife's income during her life or during the joint lives. But (prevented though he may be by the compact of 1850, at least for some time to come, from lawfully allying himself to other ladies) I have been unable to persuade myself, that in any sense he has deserved any part of this lady's fortune. Why should her means contribute to his separate maintenance or expenditure? How has he become exempted from every portion of the

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duties incumbent on a husband? Why is he not to maintain his wife? I think, that, in the particular circumstances proved, it is just and fair—is consistent with the principles, rules and precedents of this jurisdiction—and is, moreover, of good example, that (even upon the assumption of her case, as to fraud and representations and contract before the marriage, failing) he should still be excluded from the income of the 10,000*l.* Consols during their joint lives, and she, accordingly, be allowed to enjoy the whole of it for that period as from the separation in 1850, so far as she has not received it.

But (subject to the obligation, already mentioned, regarding the policy, an obligation to which, if she could object, she does not), I have had doubt, whether the dividends of the 10,000*l.* Consols, and the next friend of Mrs. Barrow, ought not to be relieved by her husband altogether from the costs of these suits as between party and party at least. On the whole, however, he may, I think, be exempted, to some extent, from costs, though not so as to receive any. And in saying, “to some extent,” I mean that he has so conducted himself with regard to the litigation now before us as to render his total exemption improper, and that we should mark our sense of this by ordering him to pay her next friend 10,000*l.* towards costs. Not quite sure that this is just towards the wife, I am perfectly satisfied that it is not unjust towards the husband.

[After dealing with the question of the costs of the other parties his Lordship added]—

It will have been perceived, that I have not expressed an opinion whether there was an agreement between Mr. and Mrs. Barrow, as to the dividends of the 10,000*l.* Consols previous to the marriage of 1850, or whether she is entitled to relief on the ground that, before that event,
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he was improperly silent, or made any improper representation as to the true nature or position of her interest in them. My reasons for not thinking it necessary to do so may be collected from what I have said. I am willing, however, to be understood as inferring and believing from the evidence, not only that Mr. *Barrow*, before any instructions had been given for the marriage-settlement of 1850 or on the subject of it, well knew and fully comprehended the material contents of the marriage-settlement of 1839, but that, moreover, to his most certain and thorough knowledge, Mrs. *Barrow*, in the discussions and arrangements preliminary to that settlement, in executing it and in marrying him, understood and believed, that the dividends of the 10,000*l.* Consols. were, after their marriage, to be wholly for her separate use, nor would have married him upon the settlement of 1850, worded as it is, had she been aware of that true state of things, a complete acquaintance with which, during the whole time, was most plainly possessed by him. It follows, in my opinion, though technically, professionally, judicially, there may have been or may be different views as to Mr. *Barrow's* title to what he is claiming, yet that no man (be he lawyer or layman) can, looking at the claim unprofessionally, see its character in any other than one light.

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The LORD JUSTICE TURNER (after stating the facts of the case as they are above detailed), said—

The question in this case relates solely to the life interest of Mrs. *Barrow* in the 10,000*l.* Consols. If she is entitled to that life interest for her separate use, it is immaterial in what right she takes it, whether by virtue of her right to have the settlement rectified, or by her equity independent of that right.

I propose

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I propose, therefore, first to consider, how the case with reference to the life interest in these funds stands upon the equity of Mrs. *Barrow* apart from any question of rectifying the settlement. The right of a married woman to a settlement or provision, out of property to which she is entitled in equity, is of course beyond all question, and the cases which were cited in the argument have fully established, that this Court exercises a discretion as to the extent of the settlement or provision, and has full power to secure the whole to the wife, if, under the circumstances of the case, it thinks fit so to do. The first question, therefore, to be considered, is what are the circumstances to which the Court will have regard in the exercise of this discretion.

It was observed in argument, on the part of the Defendant the husband, that the cases which were cited were cases in which the husbands had already received some considerable part of the fortunes of their wives and, no doubt, the fact of the husband having received other property of the wife is a fact to be taken into consideration, but I by no means think that it is the only fact to be considered. When this Court is called upon to exercise its discretion, it is bound, as I conceive, to act upon a just view of all the circumstances of the case, and not to limit its view to any one particular point. More especially, in my judgment, is the Court bound in cases of this nature, to look to the conduct of the husband. The husband's right to the equitable property of his wife rests upon his legal rights, and his legal rights mainly rest upon his obligation to maintain his wife. If, then, he has so conducted himself, as that she cannot live with him, surely that circumstance must be taken into account in determining the provision to be made for her. It would, as it seems to me, be against all principle to hold, that in cases of this nature, the conduct

duct of the husband is not to be taken into account, and such a position would, I think, be hardly less opposed to authority. The misconduct of the wife weighs heavily against her equity for a settlement. It has even been held, that if she be an adulteress, this Court will render her no assistance, and make no provision for her, *Ball v. Montgomery* (a); *Carr v. Eastabrooke* (b), and I do not see how, consistently with justice, it can be held, that misconduct of the wife affects her rights, but that similar misconduct on the part of the husband has no operation upon his. Indeed, the cases to which I have referred, shew that, although there may be misconduct in the wife and no misconduct in the husband, the Court will not give him the income as he does not maintain her.

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In determining this case, therefore, we are bound, in my opinion, to look into the conduct of the Defendant the husband. Upon examining it, we first meet with a divorce for adultery on his part. I am by no means satisfied, that it is necessary to go further, and that this alone is not sufficient to deprive him of any right to any portion of the dividends of these funds. Such a decision would be far within the range of *Ball v. Montgomery* and *Carr v. Eastabrook*; but it is unnecessary to go so far in the present case. I have read most carefully the whole of the evidence in the cause, and, upon reading it, I am perfectly satisfied, that the marriage was contracted by this Defendant from interested motives merely, and that his conduct after the marriage was such as to render it impossible for his wife, with due regard to her character and position, to continue any longer to reside with him. I found this conclusion not upon facts which can fairly to be said be in dispute upon the evidence, but upon the husband's own statements upon

(a) 2 Ves. 191.

(b) 4 Ves. 147.



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upon many facts which are sworn to on one side, and not denied upon the other, upon other facts confirmed by independent testimony and upon the terms which the Defendant himself proposed for a reconciliation—terms which no man, having the least sense of the duties and obligations of a husband, could have ventured to propose.

This being the view which we take of the equity for a settlement or provision, as distinct from the question of rectifying the settlement, it is unnecessary for us to give any opinion upon that part of the case. The decree must be varied, as my learned brother has suggested.



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**T**HESE were two appeals from a decree of the Master of the Rolls, directing a scheme for the regulation of a charity, created by the will of Mr. *Richard Watts*.

*Before The  
LORDS JUSTICES.*

Where property was devised in the sixteenth century in trust to apply the income for the perpetual sustentation of an almshouse for the comfort, placing and abiding of the poor within the city of R., and to provide six beds to harbour or lodge poor wayfaring men no longer than one night, to each of whom four pence was to be paid; and also in trust to

By the will, which was dated the 22nd of August 1579, the testator, after directing that the mayor of the city of *Rochester*, at that time being, together with *William Streaton*, *William Hall*, *Richard Wilkinson*, then principal citizens of the said city *John Maplesden*, *George Swamond* and *John Nicholson* the elder, or any four or three of the survivors of them, or for default or lack of four or three of them being deceased, then that the Mayor of *Rochester* aforesaid for the time being, together with four principal citizens of the same city for the time being, should sell the testator's principal house or tenement called *Satis*, and the messuage or house

thereunto

purchase flax, &c. for setting the poor at work according to the 18 *Eliz.* c. 3; and the income of the property had greatly increased:—*Held*, that an administration of the charity, which made no increase in the number of wayfarers relieved, or in the amount of the viaticum, was not a proper one, and that a scheme ought to be directed upon an information being filed, although it did not pray relief in respect of the administration of this part of the charity.

*Quere*, whether the payment (after making provision for poor travellers) of the residue of the income to the parish officers in ease of the rates was a proper administration of the charity.

Where a charitable gift is ambiguous, it may be interpreted by the aid of contemporaneous usage, but no length of usage will warrant a deviation from the terms of a trust which the Court regards as plain, and the Court did not hold itself bound as to such deviation by proceedings in former suits, in which the question did not directly arise.

There must be a substantial ground for an appeal on the part of defendants to a charity information to exempt them from payment of costs, and the intimation of the opinion of the Court below upon the substance of the case in pronouncing a decree which contained no declaration, and merely directed a scheme, was not held to constitute such a ground.

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thereunto annexed, with the appurtenances, and all his furniture, plate and household stuff set down in an inventory by him then ready made, and all his leases and terms of years, and that the money thereof had and received should be bestowed in manner thereafter expressed. After giving a pecuniary legacy he directed that of the residue one stock or portion of money should be made and continued, and be put forth to gain and profit, and that the yearly profits should be bestowed and employed for and towards the perpetual relief, comfort and sustentation of an almshouse, and such poor people as were thereafter limited (that was to say), first, that in the almshouse then already erected and standing beside the market cross, within the city of *Rochester* aforesaid, there should be re-edified, added and provided (with such rooms as were there already provided), six several rooms with chimnies, for the comfort, placing and abiding of the poor within the said city, and also be made apt and convenient places therein for six good mattresses or flock beds and other good and sufficient furniture to harbour or lodge in poor travellers or wayfaring men, being no common rogues or proctors, and that they the said wayfaring men should harbour and lodge therein no longer than one night, unless sickness were the further cause thereof; and he directed that those poor folks there dwelling should keep the house sweet, make the beds, see to the furniture and keep the same sweet, and courteously entreat the said poor travellers; and he directed that every of the said poor travellers at their first coming in should have 4*d.*, and that they should warm them at the fire of the residents within, if need were, which charges of the poor travellers aforesaid he directed should be maintained and continued of the yearly profits, rising of the said stock being well employed unto the said purpose.

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The testator also gave as follows:—"Item. I will give and bequeath unto the mayor, principal citizens or commonalty of the city of *Rochester* aforesaid, or by any other name or names as they be incorporated, and to their successors for ever, all my lands, tenements and hereditaments, with their appurtenances whatsoever (except my principal tenement called *Satis* and the tenement that *John Fryer* dwelt in, with the appurtenances, which before I have willed to be sold), and the yearly profits and the rents of the said lands shall be to the building and re-edifying and increasing of the said alms or abiding house near the corner cross in *Rochester* aforesaid, and for the prbvision of flax, hemp, yarn, wool and other necessary stuff to set the poor of the said city at work, according to the purview of a certain statute made at *Westminster* in the eighteenth year of the reign of our most gracious Queen *Elizabeth*, touching an Act for the setting of the poor a work and the avoiding of idleness, and for the further relief of such as be poor and impotent as the statutes of this realm will permit and allow; which yearly profits of my lands I have put down, rated and valued as they be now yearly let at this present (that is to say), my lands and tenements in *Chatham* aforesaid, 13*l.* 6*s.* 8*d.*; my lands and tenements in *St. Margaret's*, 5*l.*; my lands and tenements in *Halsto*, 50*s.*; my lands and tenements in *Cuxton*, 40*s.*; my windmill at *Shorne*, 6*l.*; also my tenement at *Longlane* end, in *London*, total 36*l.* 16*s.* 8*d.* And whereas, before, I the said testator have willed my principal house called *Satis*, with the appurtenances, and my said leases, goods and moveables to be sold, and to be used and employed as is aforesaid, so my mind and will is, that the said mayor for the time being, and the other parties before appointed to make the said sale, shall have towards their costs and charges and pains 5*l.*: Provided always, and my will is, that the mayor, principal citizens and commonalty

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monalty aforesaid, and their successors, of the city of *Rochester*, or by any other name or names as they be incorporated, immediately after the sale of my said house called *Satis* and other the premises, shall become bounden and obliged unto my next heir or heirs male, or my eldest heir female in blood for lack of heirs male, in a double sum of money of the value of the said sale or stock, that they shall to the uttermost of their powers preserve and maintain the stock aforesaid, and the yearly gain and profits thereof rising shall employ unto the uses and purposes before recited, but chiefly and principally to the relief and comfort of the said poor travellers or wayfaring people." •

By an indenture dated the 26th of *April* 1593, made between Mr. *Thomas Pagett* and *Marian* his wife (late the wife of the above-mentioned *Richard Watts*), and the mayor and citizens of the city of *Rochester*, and certain other persons, reciting that there had arisen divers ambiguities and doubts, as well touching the above gift and bequest concerning the sale of the said principal house or tenement called *Satis*, and the messuage or house thereunto annexed, and the said leases, stuff, furniture, plate, utensils, household stuff, goods and chattels, and how the same profit and gain might be brought to continue, which should be grounded only upon usury and interest for loan of money; as also great doubt how the profits and rents of the said lands might thereafter continue and be employed to the uses and purposes appointed and declared in the said will: it was expressed to be thereby agreed, that in consideration that the said *Thomas* and *Marian Pagett* might have and hold the said property and inheritance of the said house and tenement called *Satis*, and the tenement thereunto annexed, and the said stuff, plate, utensils of household goods and chattels in the said will limited to  
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be sold, they would not only pay to the said mayor and parties authorized to sell the same the sum of 100 marks of lawful money of *England* for and towards the repairing and amending of the said almshouse, and provision of such bedding and furniture as is afore mentioned, but also did undertake to discharge all the said sums of money, and to convey certain other property to the mayor and citizens. By the same deed, the mayor and citizens, for themselves, their successors and assigns, and every of them, covenanted that the revenues and profits which from thenceforth at any time or times thereafter should arise of the said messuages and tenements, and all sums of money which should be received by or upon the revenues thereof and every of them, should be from time to time employed in manner and form following, that was to say, that therewith and with and by such other tax and means as by the statute made in the 18th year of her said Majesty's reign should or might be lawfully had or levied in the said city and limits and precincts thereto belonging, flax, hemp, yarn, wool and other necessary stuff as is aforesaid should be at all and every time and times thereafter provided and had in store in the said city, and from time to time delivered to the poor of the said city of *Rochester* and limits and precincts thereof belonging, that would work upon the same, and that the workers thereof should be within three days after reasonable request, after the end of the working thereof, paid for their pains therein, and that the things so spun or wrought in cloth or otherwise, as soon and speedily as might be, should be sold to the uttermost and best value, and that the money and all other profits received thereof or therefore should be employed partly to the provision of new flax, hemp, yarn, wool and such other stuff as aforesaid, to be likewise delivered, wrought and sold, and the rest towards the charges of the relief of the said travelling men as were aforesaid; and that all such travelling

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travelling men as were mentioned and meant in the said will to be harboured and lodged, not exceeding the number of six in any one night, should be upon their request nightly there harboured and lodged and have four pence a-piece satisfied and paid unto them within one hour after their first placing there according to the true meaning and intent of the said will, and that if any default should be had or made at any time or times in or concerning the employing, bestowing or payment of the revenues profits and sums of money aforesaid, or any of them, or any part or parcel of them, or any of them in and for the intents and purposes aforesaid, or in or concerning the harbouring or lodging of the said poor travellers or the payment to them, or the said workers, or any of them, or the said sums, contrary to the good meaning of the said will and of the deed, certain penalties therein specified were to be paid by the corporation.

The statute of the 18th of *Elizabeth*, c. 3, s. 4, which is referred to in the will and the deed, "To the intent that youth may be accustomed and brought up in labour and work, and then not like to grow up idle rogues, and to the intent also that such as may be already grown up in idleness and are rogues at this present may not have any just excuse in saying that they cannot get any service or work, and then without any favour or toleration worthy to be executed, and that poor and needy persons being willing to work may be set on to work," provides that in every city or town corporate within the realm, a competent store and stock of wool, hemp, flax, iron and other stuff, by the appointment and order of the mayor, bailiffs, justices or other officers having rule in the said cities or towns corporate (themselves and all other the inhabitants within their several authorities to be taxed, levied and gathered) shall be provided; and that the poor shall be paid for their work, and the profit applied

applied to purchasing a new stock, and that any person refusing to work shall be treated as a vagabond and punished accordingly.

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In 1672 an information was filed on behalf of the parishes of *St. Margaret* and *Strood*, within the city of *Rochester*, in which a decree was made on *February* 18th 1674, whereby the Court declared that those parts of the parish of *St. Margaret* and *Strood* that were within the limits, liberties or precincts of the city of *Rochester*, ought to have a share and proportion as well of the work as of the surplus of the charity, and did therefore order and decree the same to them for ever thereafter accordingly; and it was thereby referred to Mr. Justice *Twisden*, Sir *Robert Barneham*, Sir *William Twisden* and Sir *John Bankes*, or any three of them, to set out such share and proportion of the said work, and also of the surplusage of the money arising and annually coming and remaining of and from the rents and profits of the lands and tenements devised and settled to and for the charitable use aforesaid, over and besides what should serve for ever the charitable uses in the will expressed to be annually paid and distributed for ever in such proportions to the said parishes of *St. Margaret's* and *Strood*, for and towards the relief of such of the poor inhabitants of the said respective parishes as were residing and dwelling within the liberties and precincts of the said city, in such manner as the said referees, or any three of them, should think fit; and it was also ordered that the said mayor and citizens and their successors should for ever thereafter yearly account before the wardens and commonalty of *Rochester* Bridge, or such other as by the said indenture was directed and appointed (other than the vicar of *St. Nicholas*, which was or should happen to be eldest residentiary prebend) of and for all the yearly revenues and other the matters and things relating to the said charitable

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use, and of and for all the improvements, receipts and payments concerning the same.

In pursuance of the decree, the referees apportioned the property among the parishes of *Strood* and *St. Margaret*, and the mayor and citizens of the city of *Rochester* for ever, to be employed as well for the relief of travellers in the said will and indenture mentioned and other the charitable uses in the said indenture mentioned as for the benefit of the poor of the parish of *St. Nicholas*, within the said city of *Rochester*, to be continued for ever.

By an order made in 1680 the award, and all the matters and things therein contained, were ratified and confirmed.

Some further particulars respecting this and two other suits are stated in the judgment of Lord Justice *Turner*, *post*, and are omitted here to avoid repetition.

The information in the present suit complained of the application of the surplus (after providing for the relief of the poor travellers) in ease of the poor-rates, but did not expressly seek relief in respect of the former part of the charity.

The mayor and corporation and the trustees, by their answers, said, that the income of the charity property for the year ending *Michaelmas* 1835, amounted to 2,500*l.*; that the municipal corporation ceased to administer the funds in the year 1836; that there was a sum of 4,000*l.* in stock, and that substantially the income amounted to above 3,000*l.*; that the establishment of the charity-house consisted of the keeper, (the person who was now the keeper having been appointed by the mayor or the municipal corporation previous to the year 1835,) and that

that such keeper resided in the charity house ; and that he now received a salary of 30*l.* per annum for keeping the house and furniture in order for the accommodation of travellers ; and that the rule was, that any travellers, not exceeding six, received tickets of admission to the said house on application to the provider for the poor in the said city ; and that such tickets entitled them to lodge in the said house one night, and to have coals found them, and to have an allowance of fourpence in money ; but that since the introduction of gas, which was now used in the house, such travellers were not (as the Defendants were informed) provided with candles. That by the annual account of the income and expenditure of the charity, it appeared that the sum of 75*l.* 12*s.* 3*d.* only had been applied during the year for the expenses of the said house for the reception of poor travellers or otherwise for their relief or benefit ; that the said sum of 75*l.* 12*s.* 3*d.* was paid out of the portion of the income of the said charity property payable to the parish of *St. Nicholas*, and that the annual expenses of the said house were in like manner, in each and every year, paid out of the parts of the said income payable in each year to the parish of *St. Nicholas*. That the municipal trustees under the Corporation Act were in possession of the estates and received the rents. They managed the property, paid the expenses connected with the management, including the almshouse, and then handed over the surplus to the parish officers of the several parishes, who applied it to the purposes for which the poor-rates were applicable in the said parishes respectively, and in exoneration of the liability of the rate-payers of such parishes respectively.

The *Solicitor-General*, and Mr. *W. M. James* for the Attorney-General, appeared in support of the decree.

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Mr. *Campbell* and Mr. *Messiter*, for t  
 of *St. Nicholas*, in support of one of t  
 Mr. *Glasse* and Mr. *Heberden*, for th  
 of *St. Margaret's*, in support of the oth

The information makes no complaint  
 of the charity which relates to the ma  
 almshouse or the reception of poor tr  
 only question therefore is, whether the r  
 properly administered by applying the e  
 ease of the poor-rates. We submit, tha  
 ported as a proper course of administr  
 terms of the will and the deed of endow  
 the former decrees of this Court, from wh  
 been brought; and, 3rdly, by long usag  
 is sufficient interpretation of the terms o

First, with respect to the provisions of  
 provisions expressly refer to the two A  
 the provisions of which were combined  
 c. 2. The testator embodied the wor  
 statutes in his gift, which was to be f  
 poses; first, the relief of the poor, an  
 setting them at work. For those two p  
 seers and churchwardens had a power  
 he alludes in his will accordingly to the  
 Therefore, the fair construction of Mr.  
 that the income of the charity was appl  
 in aid of the poor-rates to be levied or  
 He does not provide merely for the e  
 almshouse, which may be called a speci  
 rity irrespective of poor-rates; but he p  
 two purposes which themselves constitu  
 den of all poor-rates, to wit, the setting c  
 poor to work, and the relief of the ag  
 It cannot be said that a charity may not  
 in aid of the poor-rate. In *Attorney*


*Corporation of Berwick-upon-Tweed* (a), the gift was for the erecting and maintaining a house of correction within the borough, and for maintaining and ordering the poor therein for ever, and all other idle persons coming and being therein. That was heard before the late Master of the Rolls; and his Lordship said, "Generally speaking, gifts for the use of the poor are not gifts in aid of the poor-rates; because (as it has been said in other cases) gifts in aid of the poor-rates would be gifts for the benefit of the rich and not of the poor. But in this particular case, this town not having taken the benefit of the statute of *Elizabeth*, and never at this time having raised poor-rates, these were gifts for purposes in respect of which poor-rates were to be levied under that statute. These gifts, therefore, were a substitution for poor-rates, poor-rates having been adopted in that town in the year 1729. The declaration of the Court must be that these were gifts in aid of the poor-rates." Now unquestionably the gift there was not more clearly or expressly in aid of the poor-rates than the gift in the present case. Lord *Eldon*, in *Attorney-General v. The Corporation of Exeter* (b), says, "It is said, that, where a charity fund is given to persons who receive parochial relief, it is applied in exoneration of the rich, who contribute to the public burdens of the parish. I say,—that is not so. There may be many cases in which there cannot be a more prudent application of a charity fund than by giving it to those who are receiving parish relief; not thereby exonerating the rich from contributing to the relief of the poor, but adding to the relief, which the law has provided, further relief, which the rich are not bound to afford."

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Secondly, the only point in dispute in the present
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(a) *Tamlyn*, 239.


(b) 2 *Russ.* 52.

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suit has been decided by authority, from which this Court cannot depart. The information of 1672, which came before Lord *Nottingham*, contained the same complaint as the information in the present case. It was that the corporation had for several years employed about three parts in four of all the rents, issues and profits, and of the improvements, in defraying the common charges which ought to have been paid by the inhabitants of the parish of *St. Nicholas*, out of their own purses and estates, towards the relief of the poor of the same parish, to ease and free themselves and the rest of the inhabitants of the parish from those charges whereby they themselves and the inhabitants were only partakers of the benefit of the charitable use. The information there raised two questions; first, as to the shares of the parishes; and secondly, as to the mode of application; and we find that as far as express words go, Lord *Nottingham* merely remedied that branch of the complaint which related to the admission of the wayfarers. Having done so, it became necessary for him to consider what should be the administration for the future of the rest of the charity, as to which complaint had been made. But as the decree is silent as to this, the unavoidable inference is, that so much of the complaint was rejected.

Lord *Nottingham* directed that the proportions of the two parishes of *St. Margaret* and *Strood* should be paid to the churchwardens and overseers of the poor of those parishes, to be by them employed to the intent and purpose mentioned. With regard to the shares which belonged to *St. Nicholas*, he did not direct those to be paid to the churchwardens or overseers of *St. Nicholas*, but imposed upon those shares the burden of keeping up the almshouse, and consequently directed them to be received by the corporation, and to be by them applied
 first

first in keeping up the almshouse, and secondly in relief of the poor of the parish of *St. Nicholas*. Lord *Nottingham*, therefore, must have intended to decide the question as to the application, else he would not have ordered that the funds coming to the parish of *St. Margaret* and the parish of *Strood* should be paid to the churchwardens and overseers of the poor of the parishes. It cannot be maintained that the churchwardens and overseers represent the poor of a parish in any other sense than that they are the persons to levy the rates.

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An information as to the administration of this charity came before Sir *William Grant* (a), who admitted the parish of *Chatham* to participate in the benefit of the charity. It was an information at the suit of the Attorney-General, and also a bill by the guardians of the poor for that parish. Sir *William Grant* decided in favour of the guardians, who, when funds were received by their officers, would of course apply those funds in aid of the poor-rate. Another information was filed (b) by the parish of *St. Margaret*, in the year 1829, praying for a new apportionment of the funds. That was also not merely an information, but it was an information by the Attorney-General, and a bill by the churchwardens and overseers of the poor of the parish of *St. Margaret*. In the result they did not obtain the larger allotment, which they claimed by the information and bill, and the Vice-Chancellor said, "What is now asked is to depart from the spirit of Lord *Nottingham's* decree, and therefore this information must be dismissed with costs." There was an appeal from the decision, which was affirmed by Lord *Lyndhurst*. The present mode of administering the charity was also sanctioned by an order made

(a) See a reference to this in *Rochester*, 6 Sim. 275.
Attorney-General v. Mayor of (b) 6 Sim. 273.

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made at the Rolls, by Sir *John Leach*, in the case of the parish of *Chatham*. By this order (which was made upon a petition of the inhabitants of a part of the parish) a payment of a portion of the income of the charity was directed to be made to the treasurer of the parish of *Chatham*, to be by him, when so received, from time to time applied in ease of the rates to be assessed on the inhabitants of the part of the parish of *Chatham*, called *Chatham intra*, for the relief of the poor.

Lastly. There has been an uninterrupted usage from the time of the decree of Lord *Nottingham*, not only without complaint, but with the sanction of the Court on the subsequent occasions to which we have referred, and we submit that in these circumstances this Court has no authority to interfere with or to alter the destination of these funds thus settled and established; *Glasgow College v. Attorney-General* (a).

[*The LORD JUSTICE TURNER.* Is not the present appeal at all events premature? The first trust is to employ the income for and towards the perpetual relief, comfort and sustentation of an almshouse, and such poor people "as shall be hereafter limited, named and expressed." Must there not be a scheme as to this, however the question as to the rest of the charity may be determined? The decree only directs a scheme. Suppose the Court should agree with you, that a portion of these funds should be applied to the poor-rate. Is there to be no inquiry?]

We put the case as high as that. Upon this information the only question raised, is as to the application in ease of the poor-rate, which is alleged to be wrong.  
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(a) 1 *H. of L. Cas.* 800.

There is not one single word as to any other alleged misapplication, nor with respect to the prior trusts. The only question raised on the pleadings, is whether the funds shall or shall not be applied in aid of the poor-rates. [*The LORD JUSTICE TURNER.* But in charity cases the Court does not confine itself entirely to the scope of the information.] With respect to the appeal being premature, it is to be observed, that the Master of the Rolls in giving judgment expressed an adverse opinion to the Appellants on the substance of the case, and as the scheme would have been settled by his Honor it would have been merely a waste of time and expense not to appeal at once. His Honor considered the case to be like that of *Attorney-General v. Bovill (a)*; but we submit that the two are completely distinguishable. In *Attorney-General v. Bovill (a)*, the funds were not given in aid of the poor-rate, for there existed no poor-rate at the time. In that case, moreover, Lord *Cottenham* said that he did not in fact overrule the decree of the Master of the Rolls, as the two judgments were consistent. Another distinction is, that the decree of Lord *Nottingham* in the present case was inrolled, whereas the decree of the Master of the Rolls in *Attorney-General v. Bovill (a)* was not inrolled. A fourth distinction is, that there the Lord Chancellor was dealing with a decree of the Master of the Rolls, whereas in the present case the decree appealed from is one of a Master of the Rolls overruling or altering a decree which had been made by a Lord Chancellor.

They also referred to *Attorney-General v. Whiteley (b)*; *Attorney-General v. The Drapers' Company (c)*; *Attorney-General v. The Grocers' Company (d)*; *Attorney-General*

(a) 1 *Phil.* 762.

(b) 11 *Ves.* 241.

(c) 6 *Beav.* 382.

(d) 6 *Beav.* 526.

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*General v. Caius College (a); Attorney-General v. The Bishop of Worcester (b).*

Mr. Vincent, for other parties.

*The LORD JUSTICE KNIGHT BRUCE.*

The decree complained of is merely this: "His Hon<sup>or</sup> doth order that proposals for a scheme be laid before the Judge of the Court to whom this cause is attached for the application of the rents and profits of the charity estate in the pleadings mentioned, regard being had to the will of *Richard Watts*, the testator in the pleadings named to the Indenture dated the 26th day of *April* 1593, and to the decree of Lord *Nottingham*, made on the 3rd day of *November* in the 32nd year of the reign of *Charles* the Second. And it is ordered that the further consideration of this cause be adjourned, and any of the parties are to be at liberty to apply to this Court as there shall be occasion." With this the Attorney-General, who has important duties to perform in the suit, is not dissatisfied; his reason possibly being that there is no reference to the Master, and that the scheme will be settled by the Judge before whom the cause was heard, and probably will be heard subsequently. The Corporation of *Rochester* do not complain, nor do the charity trustees. The Appellants, whom I do not doubt to be intelligent as well as worthy individuals, are, nevertheless, parish officers, and being parish officers, have, by some process of reasoning, that I am unable to understand or follow, persuaded themselves that the Attorney-General has obtained no less but more than, as representing the rights of society and the public interest, he was entitled to claim.

Let it, however, be assumed (though I am not giving

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(a) 2 *Keen*, 150.

(b) 9 *Hare*, 328.

an opinion) that at the time when the information was filed the rents of the charity estates were not in a course of application, which, as to more than nine-tenths of them, was a course of misapplication. Let it be assumed (though I do not say that it could be right) that the bulk or some portion of the revenues of these estates should be received by parish officers and by them be applied, with parish and borough rates, for the ordinary purposes of parish and borough rates; still it is impossible not to notice the striking disregard with which, notwithstanding the great increase of this property, the plainly-expressed wishes and intentions of the testator in his will, and of the subsequent deed, with respect to an almshouse, have been treated. It is impossible not to disapprove and disavow the omission to increase the assistance, which, by both the will and the deed, was directed to be given to needy wayfarers, as to whom, not only in number but in amount also of viaticum, the provision made in the sixteenth century has not been augmented, while the rents have, since that time, increased by thousands. In the face of all this, churchwardens and overseers have been found to contend that the justice of the country, apprized of these abuses, shall allow them to remain as they are,—a contention which, (the Court being now possessed of the case, and having the power if not to redress the past at least to control the future,) is scarcely a serious affair. But it is a matter of regret and something more, that in a community on various grounds civilly and ecclesiastically so considerable as the city where this charity was founded, there should so long have been tolerated, nay, (from reasons too obvious, I fear,) fostered and encouraged, a system of wrong, which, viewed in the light most favourable towards the Defendants, whether as a mere matter of money among the living or as involving the spoliation of the dead, is, in point of law as well as morality, without apology and without excuse.

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In this case the income of the property which is in question (now of very great amount) has for a great length of time been applied in ease of the poor-rates that income being by the will and the deed which are the foundation of this charity devoted to trusts, to which I shall presently have occasion to refer. This matter having come before the Master of the Rolls, he has by his decree directed a scheme to be laid before the Court for the application of the charity income, having regard to the will of the testator, to the deed which followed on that will, and also to a certain decree which has been made by this Court; and this appeal comes before us from the decree, so directing a scheme, having regard to the will, the deed, and the former decree of the Court.

Now, in a case of that nature, I apprehend, it rests upon the Appellants to show that the administration of this charity, in the mode in which it has been administered, is absolutely right and proper; or, at all events, that some qualification ought to be introduced into the decree as to any alterations which may be proposed to be made, under the scheme which the Court is about to carry into effect; because, unless the Appellants satisfy us either that the administration is proper or that some qualification should be introduced as to the scheme, the decree must be right, it being the duty of the Court to take care that a proper scheme is laid down for the administration of the charity.

The Appellants carry their arguments to this extent. They say that the application of these funds in aid of the poor-rates is altogether a just and due application of the funds; and they justify that application upon three grounds: upon the will of the testator, the decree:

decrees of the Court, and usage. The first instrument, therefore, which is to be looked at in the present case, is the will of this testator. [His Lordship read the material portions.] Now the first trust which is created by the will is a trust for the maintenance of the almshouse near the Corner Cross, at *Rochester*. And consequently, the first question that arises on this decree, is whether it can be a due administration of this trust to apply funds which are, in the first place, subject to the maintenance of the almshouse, in ease of the poor-rates falling on the parishes of *Rochester*, and whether it can have been wrong for this Court to have directed a scheme for the application of the funds which are, in the first place, applicable towards the almshouse, but which are, in fact, applied to another and a totally different purpose?

Let us look, however, a little at the subordinate trust. The subordinate trust is to provide flax, hemp, yarn, wool and other necessary stuff to set the poor of the city to work according to the purview of the statute of the 18th of *Elizabeth*; and as to the remainder, for the further relief of such as be poor and impotent, as the statutes of this realm will permit and allow. It is argued on the part of the churchwardens, that because that was the mode in which relief was administered to the poor at the time when the will was made by this testator, the income is now applicable to the relief of the poor according to the mode in which that relief is now administered; and, not only so, but that it is applicable to all purposes whatsoever to which the poor-rates are by law now applicable. Of course I do not mean now to decide that question. It may be very proper that some portion of these funds should in some manner be applied for the benefit of poor people receiving parish relief; but what the Appellants have here to maintain is, that the whole  
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of these funds are bodily to be paid over to the overseer of the parish for the purpose of being applied like poor rates for the purposes to which those rates are now applied, going far beyond the purposes which were prescribed by this testator. In truth, they are seeking to found upon a trust which, to say the least of it, was in aid of the mode of relief at that time administered by a trust for the application of the funds for the relief of the poor in another and totally different mode. I think it is impossible here to say that the application of the whole of these funds, in the mode in which they have been applied in ease of the poor-rates, is an application consistent with the trusts declared by this will; and if it is not, then it is the duty of this Court to direct an inquiry and the settlement of a scheme for the application of the funds, unless the point has been disposed of by decisions already pronounced upon it.

The next question therefore is, whether there has been any such decision. The Appellants say, that there has, and that it is contained in a decree pronounced by Lord *Nottingham* as long ago as 1674. In examining that decree to ascertain what it decided, it is necessary to inquire what was the nature of the suit. It was instituted to extend the application of the funds, which had been applied for the benefit of certain parishes, to two other parishes. The prayer of the information was, that an equal number of the poor of *St. Margaret* and *St. Andrew* might be set on work with the parish of *St. Nicholas*; and that they might have an equal proportion of the present and future revenues and improvements of the charity. The question, therefore, which was raised in that suit was, whether the fund was specifically devoted to the benefit of the poor of particular parishes, or whether it extended to the benefit of the poor of other parishes, which were part of the city of *Rochester*. I

is true that there was contained in the information a charge, that for several years the parish of *St. Nicholas* had employed three parts in four of all the rents, issues and profits, and of the improvements, in defraying common charges, which ought to have been paid by the inhabitants of the parish of *St. Nicholas*, out of their own purses and estates, towards the relief of the poor of the same parish, to ease and free themselves and the rest of the inhabitants of the parish from those charges, whereby they themselves and the inhabitants were the only partakers of the benefits of the charitable use, and not the poor of the city; but no relief was prayed on that subject, the relief prayed being confined to a declaration that certain other parishes might have an equal proportion of the then present and future revenues and improvements. The nature of the suit, therefore, was to have it determined, whether the other parishes were entitled, with the parish of *St. Nicholas*, to their share of the income of the charity, but not specifically asking any declaration or decision of the Court upon the subject of the application of the funds. I quite agree that it was within the power of the Court (and perhaps I may go further, and say that I think it was the duty of the Court), if it thought there was a misapplication of the charity appearing upon the record before it, to deal with that misapplication, though there was no specific prayer for relief addressed to that subject. But then let us see how the matter did in truth stand before the Court at the hearing of that information. We must take that not merely from the allegation which is contained in the bill, but from what appeared in the answer of the Defendants, who were administering the charity at that time. That answer does not state the fact to be that the funds were applied in aid of the poor-rates, or in ease of the poor-rates, but it states that the funds had been applied in the maintenance of the hospital or almshouse, the comfort and relief

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relief of poor travellers, and setting the poor in or about the said city at work, and the residue thereof to the further relief of the said poor of the said city, which did accidentally and in consequence redound to the ease of the inhabitants of the said parish of *St. Nicholas*, in the charges and assessments towards the relief of the poor as was intended by the testator. Then they state the mode in which the inhabitants were relieved. They confess that they and their predecessors had employed and disposed of the overplus of the rents and profits of the premises, (besides what was sufficient for the maintenance of the said hospital and almshouse, relief of poor travellers, and setting the poor to work,) for the relief of the poor of the said city, by way of weekly or monthly pensions, and allowance to divers of them, providing fuel and other necessaries for them, according to their necessities, and also to the placing out of poor children, and otherwise to the relief of the said poor of the said city as the mayor and citizens of the said city from time to time thought fit. From that answer, therefore, there does not appear to have been then an application of these funds in the mode in which at the present moment they are admitted to be applied, in aid and in ease of the poor rates, but there appears to have been an administration of further relief to poor people in the shape of weekly and monthly pensions and allowances, provision of fuel and placing out their children in the character of apprentices. And when we look at the decree which was made by Lord *Nottingham*, we must of course regard it according to the circumstances as they stood before him. Having regard to the circumstances as they appear on the answer, there does not appear to have been at that time any breach of trust of this charity apparent on the proceedings, calling for a declaration of the Court on the subject of the mode of application. The charity, no doubt might have been applied in some other mode at that time  
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than that which appeared on the answer; but, on the answer, there were statements of further relief administered to the poor beyond what they could be entitled to receive under the provisions of the Poor Law Act. Then look at the decree which is made by Lord *Nottingham*. Lord *Nottingham* declares that the two parishes "ought to have a share and proportion, as well of the work as of the surplus of the charity, devised and settled as aforesaid, according to the present revenue thereof, and thereafter according to such improvements as shall at any time thereafter be made thereof." And the decree is, that they shall have it for ever, and it is referred to Mr. Justice *Twisden*, Sir *Robert Barneham*, and others, or any three of them, to set out such share and proportion of the said work, and also of the surplusage of the money arising and annually coming and remaining of and from the rents and profits of the lands and tenements devised and settled to and for the charitable use aforesaid, over and besides what shall serve for ever the charitable uses in the said will expressed, to be annually paid and distributed for ever. So that this decree keeps on foot the previous trust for the almshouse, by limiting the powers of the referees under the decree to the surplus, after providing for the previous purposes. The matter referred to them was, to set out the share and proportion of the work, and of the surplusage to which the several parishes were entitled. So far, therefore, as the referees went beyond merely ascertaining the proportions, they went beyond the authority which was given to them by the decree. They made an award, by which they set out the different proportions which the parishes were to take, and in doing so they certainly seem to me to have gone beyond the authority which was given to them by the decree, for they not only ascertained the proportion which each of these parishes was to take, but they shifted the trust for the almshouse upon the proportion which

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was allotted to one parish, relieving, therefore, or purporting to relieve, by their award (not in conformity with the decree, or the authority given to them by the decree,) a portion of the charity fund which was given to the two other parishes, from the trust to which that fund was subjected by the will of the testator, and the deed which followed upon that will. Therefore, to that extent, these arbitrators or referees clearly went beyond their authority. It is said, however, that this Court confirmed and acted upon that award. But at the foot of the award there is this memorandum, signed by the Mayor of *Rochester* and several members of the corporation. "We, the mayor and citizens of the city of *Rochester*, do consent and agree that the several parishes of *St. Margaret* and *Strood*, before mentioned, shall have the several shares and proportions of the work and surplusage of the rents and charity before expressed, in such manner and form as is before set forth and allotted." There are also like memorandums signed by the minister and principal inhabitants of the parish of *Strood*, and by the minister and principal inhabitants of the parish of *St. Margaret*. So that this award did not take effect by its own force, and is nothing more than the agreement of the ministers and principal inhabitants of the parishes, that the charity funds which had been devoted by this testator to particular purposes should be applied in another mode than that which the testator had provided. And when the order confirming the award is looked at, it is thus expressed: "Upon opening of the matter this day unto this Court by Mr. *Bridges*, being of Plaintiff's counsel"—(The Attorney-General not appearing at all)—"and upon producing the award and reading the decree, it was prayed that the said award, and all the matters and things therein contained, may stand confirmed by the decree of this Court, the same being made by the submission and approbation of the parties concerned, signified

signified by their hands thereto subscribed to the said award: Whereupon and upon hearing of Mr. *Gibbs*, being of the Defendant's counsel, who did admit the said award was made pursuant to the said order of reference, and the same is submitted to and subscribed by the parties concerned, and does not oppose the absolute confirmation thereof: This Court doth thereupon order, that the said award, and all the matters and things therein contained, do stand ratified and confirmed by the authority and decree of this Court."

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When, therefore, this matter of the award is investigated, it turns out to have been in truth an arrangement made between the mayor and corporation of *Rochester* not under their common seal, and the minister and principal inhabitants of these parishes, as to the application of the fund in the mode, or rather, as to the proportions in which it was to be applied, (for I do not think the mode was altered by the award) in the proportions prescribed by that award. The confirmation was upon the consent of all the parties, the Attorney-General not having appeared, and was simply a matter of arrangement between them to dispose of the funds, in one respect, at least, in a manner contrary to the trusts created by the testator's will.

I think, therefore, that Lord *Nottingham's* decree, and the proceedings under it, interpose no difficulty. Then there came afterwards a suit before Sir *William Grant*, in which a decree was made. That also was a suit in the nature of a claim by a parish to be let in to a share or proportion of the funds which had hitherto been distributed between the other parishes. No question appears to have been raised as to the application of the funds, and in truth it was the object of all parties, both Plaintiff and Defendant, that the funds should continue to be

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applied in the mode in which they had hitherto been applied in case of the parish poor-rates.


Upon the whole, it appears to me that none of the proceedings relied upon interpose any difficulty in the way of a proper decree being now made for the administration of this trust.

But then it is said that the point is settled by long usage. Undoubtedly, if an instrument be doubtful in its terms, contemporaneous usage may be referred to; and if there has been a long usage in the application of funds to purposes which may be warranted upon one construction of the instrument, but which may not be warranted upon another construction of the instrument, the Court will lean to that construction of the instrument, provided it be ~~arbitrary~~ which will best correspond with the mode in which the funds have been for so long a period applied. But that is the case where the Court has not the trust before it, or at all events where the trust, if it is before the Court, is doubtful in its terms and interpretation. If the Court finds a clear trust expressed on a will, no length of time during which there has been a deviation from it can warrant this Court, as I apprehend, in making a decree in ~~contradiction~~ to such a trust. But if usage is to be regarded in the present case, where is it to be found? Which usage is best, the earliest or the latest? If the usage here is to be taken from the answer to the information which was filed in Lord Nottingham's time, can it be said that the present application of the charity funds is consistent with that usage?

I entertain no doubt that these appeals must be dismissed, and dismissed with costs. I the more readily dismiss the appeals with costs, because I think that the

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waste of charity funds in this Court has been most painful and distressing to everybody who has been called upon to administer them ; and if there has been a proper decree, I never will countenance parties coming here for their own interests against charities, in putting those charities to further expense, unless there be substantial ground for the appeal. In the present case, I think that these parties had no substantial ground for the appeals. It appears to me clear to demonstration that a scheme was necessary. I think that the terms of the decree, in saying that regard shall be had to the deed, the will and the decree of Lord *Nottingham*, left open every point to these Appellants which they could be entitled to insist on.

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LEA. v. HINTON.

**T**HIS was an appeal from a decision of the Master of the Rolls on an adjourned summons, in an administration suit, which came on to be heard with the cause on further directions. The principal question was, whether the Defendant, who was the executor of the testator in the cause, ought to be debited with 300*l.*, received by him in respect of a policy which he had effected in *November* 1848 on the testator's life. The case is reported below in the 19th volume of Mr. *Beavan's* Reports (a), where the facts are stated.

The *vivâ voce* examination which took place below had not been taken down, and application was made to

Nov. 14.  
 Before The  
 LORDS JUSTICES.

One of the makers of a joint and several promissory note, who was a surety for the other, effected an insurance on the life of the latter, with his privity and concurrence, for an amount equal to that secured by the note. The principal died, having

(a) Page 324.

appointed the surety his executor, and the surety received the insurance money:—*Held*, that to the extent to which it was not required for indemnifying the surety, it ought to be applied in payment of the debt.

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their Lordship's for a *vivâ voce* examination before themselves, but it was arranged that the case should be argued in the first instance on the evidence before the Court. On this evidence it appeared, that the Defendant was, on many occasions, the solicitor of the testator, and on very intimate terms with him, and that the testator was engaged to be married to the Defendant's daughter. It also appeared that the Defendant had joined the testator as his surety in a promissory note for 300*l.* to a Mr. *Bevan*. The Defendant claimed to be a creditor of the testator, but this was disputed, the testator having taken a son of the Defendant's as apprentice to him, at a premium, in his profession of surgeon and apothecary, and having attended professionally members of the Defendant's family; and there being a conflict of testimony as to the understanding respecting these attendances, as well as on other facts connected with the accounts between the testator and the Defendant. The Defendant stated upon his deposition, that he was the agent to the office in which the insurance was effected; that different forms of proposals were used when a party insured his own life and when a third party insured a life, but that the same printed form was applicable to all cases, only filled up in a different manner; that his recollection was not distinct on the matter, but that his impression was, that the policy was effected by him for money owed by the testator to him; that the testator never gave him instructions to insure his (the testator's) life, but that the testator signed the proposal for insurance, which was necessary, whether a person was insuring his own life, or another was insuring it. That the premium was paid by way of debit in the Defendant's account with the Insurance Company, and that there was no other entry of the premium on this insurance except in the Defendant's account-book with the insurance office; that the 300*l.* was advanced by *Bevan* on the 21st of *October* 1848, but

but the Defendant could not say whether he had lent Mr. *Lea* any money in that month, and that the proposal for insuring the testator's life was in the handwriting of the Defendant and his son. The Defendant said he could not swear that the insurance was not for 300*l.* advanced by Mr. *Bevan*. He admitted that he had received the 300*l.* secured by the policy from the insurance office, and had paid the debt to Mr. *Bevan* out of the testator's estate.

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The Plaintiff, who was a sister of the testator, deposed that she lived and resided with the testator, and kept house for him from the month of *June* 1847, until the time of his death, which took place on the 17th of *March* 1849, and that he spoke to her on two or three occasions shortly before his death respecting his affairs; and told her on his death-bed that he had insured his life for 300*l.*, and that the papers, together with his will, were in the Defendant's possession; and that he also told her that the Defendant had sold his (the testator's) practice and furniture, and that there would be quite sufficient to repay the Plaintiff the 200*l.* she had lent to him, and that after his debts were paid, there would be something considerable to be divided between the Plaintiff and her sister.

Mr. *Roupell* and Mr. *Bagshawe*, for the Appellant.

The policy was effected by the Defendant, who, in effect, has paid all the premiums. No contract is shown to have existed between him and the testator binding the Defendant to effect or keep on foot the policy. The testator cannot therefore be said to have had any interest in the policy. Whether the Defendant had an interest or not was a matter with which the testator's estate has no concern. It is a matter between the Defendant and the office. But it is clear that the Defendant, who was  
constantly

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constantly in advance to the testator, had sufficient interest to enable him to effect a valid policy.

Mr. *R. Palmer* and Mr. *J. H. Palmer*, for the Respondent.

The policy was effected, it is clear, with the privity of the testator, and for the purpose of indemnifying the Defendant in respect of the joint note. The proceeds must be therefore applied according to that arrangement.

Mr. *Roupell*, in reply. \*

*The LORD JUSTICE KNIGHT BRUCE.*

We propose at the present moment to decide but one question in this case; namely, whether the sum of 300*l.* received after Mr. *Lea's* death by Mr. *Hinton* from the insurance office ought to be debited to him as the executor of Mr. *Lea*, in account with that gentleman's estate.

If the insurance in dispute was effected by Mr. *Hinton*, as the agent or trustee of Mr. *Lea*, it is of course that the question must be decided in favour of Mr. *Lea's* estate. But if the insurance was not so effected, then I think that the facts before the Court render inevitable the conclusion that Mr. *Hinton* effected it for the purpose of protecting and indemnifying himself as a surety or creditor, or as a surety and creditor of Mr. *Lea*, in whose life Mr. *Hinton* does not appear to have had an interest in any other sense. Nor can he be heard to say, that he received the money which he did receive from the office, for any other purpose, denying as he does that he effected the policy on the account and for the benefit of Mr. *Lea*. Now, upon the materials

rials before us, it is impossible to say that the whole of this sum was required for the protection or indemnity of Mr. *Hinton* as surety or creditor, or in both capacities, exclusively of the 300*l.* due to Mr. *Bevan*, or that it was not the duty of Mr. *Hinton*, sustaining the united characters of Mr. *Lea's* executor, of surety for him as to that debt, and of the assured in the policy, who had received the money upon the policy, to apply in or towards discharging the debt to Mr. *Bevan*, if not the whole of the insurance money, at least so much of it as was not required for protecting or indemnifying Mr. *Hinton* as surety or creditor, or surety and creditor otherwise. But as executor he has debited Mr. *Lea's* estate with the whole of the 300*l.* due to Mr. *Bevan*, which sum was paid after the receipt of the insurance money; a state of circumstances removing all doubt, if doubt could otherwise have been entertained as to debiting Mr. *Hinton* with the insurance money, whether he effected or did not effect the policy as Mr. *Lea's* agent, or as a trustee for that gentleman. What I have said leaves (I repeat) untouched the question whether Mr. *Hinton* ought to be credited with any amount with which he is not at present credited.

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*The* LORD JUSTICE TURNER concurred.





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Between

MAURICE CEELY TREVILLIAN,  
on behalf of himself and all other the  
mortgagees and assignees, under 10  
*Geo. 4, c. xlvi.*, of the rates, tolls, ad-  
ditional works, hereditaments and pre-  
mises therein mentioned. } *Plaintiff,*

and

The Mayor, Aldermen and Burgesses of  
the city and borough of *Exeter*, HUGH  
MYDDLETON ELLICOMBE, and  
her Majesty's Attorney-General . . . } *Defendants.*

Nov. 14.

Before The  
LORDS Jus-  
TICES.

A corporation  
raised money  
under an Act  
of Parliament  
on mortgages  
of the tolls and  
additional  
works of a  
canal, and,  
acting on what  
the Court of  
Appeal (dif-  
fering from the  
Court below)  
decided to be  
an erroneous  
construction of  
the Act, ap-  
plied part of  
the money so  
raised in pay-  
ing off old  
mortgages

affecting other property of the corporation. On the tolls and additional works provin-  
an insufficient security,—*Held*, that the new mortgagees were entitled to follow the  
money so far as it had been erroneously applied, and to stand in the place of the old  
paid-off mortgages as against the other property of the corporation.

THIS was the appeal of the Plaintiff from a decree  
of Vice-Chancellor *Kindersley*, granting no further  
relief than that of continuing a receiver and directing  
payment of the Plaintiff's costs.

In 1825, and for some centuries previously, the mayor,  
aldermen and burgesses of the city and borough of *Ex-*  
*eter* were the owners of a canal, which had been formed  
by their predecessors many centuries since, for convey-  
ing goods, wares and merchandizes from the sideway or  
navigable channel of the river *Exe*, above the town of  
*Topsham*, to the river *Exe*, at a public quay at *Exeter*.

In 1825, the corporation formed the design of extend-  
ing the canal, so as to join the river at a lower point than  
the place where they previously joined, and in other  
respect

respects to improve the canal. With this view, previously to obtaining any Act of Parliament, they began the projected improvements and carried them on during the years 1825, 1826, 1827, 1828, and part of 1829, when they obtained an Act of Parliament, on the construction of which one of the questions in the cause turned.

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For the purpose of effecting the improvements, they borrowed several sums of money from different persons, under their general right as owners of the property, amounting altogether (exclusive of a prior mortgage to Lord Rolle for 14,000*l.*) to 44,724*l.* These mortgages were charged upon the canal, and also upon some other general property belonging to the corporation. In the progress of the alterations and improvements of the canal, they found that it was necessary to get the sanction of Parliament for their proceedings. They accordingly applied for and on the 14th of *May* 1829, obtained an Act (10 *Geo.* 4, c. xlv.), “for altering, extending and improving the *Exeter* Canal.” By that Act various powers were vested in the corporation, and (among others) a power to borrow money on mortgage of the tolls and additional works of the canal according to a form set out in the Act, without any limitation as to the amount, for the purpose of completing the improvements. Under those powers they borrowed 85,900*l.*, out of which they applied 34,724*l.* in paying off that amount of the pre-existing mortgages, other than the mortgage vested in Lord Rolle. The remainder of the money they applied in completing the improvements which they had already commenced and prosecuted in a considerable degree before the passing of the Act.

The works having been completed, the profits of the canal were for several years, and up to about the period when the bill was filed, so considerable as to produce  
 more

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more than sufficient to pay all the interest on the monies which had been borrowed by virtue of the Act of Parliament, upon mortgages of the canal property in the form given by the Act. But shortly before or about the time of the filing of the bill, owing to the making of railways and other causes, the profits of the canal fell off, and there was not sufficient to pay the interest on these statutory mortgages. The Plaintiff, who was one of the mortgagees under the Act of Parliament, thereupon instituted the present suit on behalf of himself and of the other persons who were either mortgagees or assignees of mortgagees on the property by virtue of the Act of Parliament. The Defendants were the corporation, their officer, and the Attorney-General, as representing the interest of the public. By the bill the Plaintiff insisted that, according to the true construction of the Act of Parliament, there was no authority to borrow, under the Act, any more money than was necessary for the expenditure which would be made in continuing and completing the works, which had been already commenced and which had considerably progressed at the time of the Act of Parliament, and that, at all events, there was no power to apply the monies borrowed to any purposes whatever, except the purposes of continuing and completing the works in question, and that the corporation being by the terms of the Act constituted trustees of the money borrowed, committed a breach of trust in applying 34,000*l.* of it in payment of the former mortgages, and that consequently the mortgagees, being in the nature of *cestuis que trustent*, had a right to come against the trustees to make good the loss occasioned by the breach of trust, out of their general property.

It is not considered useful to report the case upon the question of construction of the Act of Parliament. The Vice-Chancellor, from whose judgment the above statement

ment of the case is in substance taken, thus expressed himself respecting the frame and interpretation of the Act, "Now I have carefully gone through this Act of Parliament, and to say that it might have been made more clear and precise than it is, or even to say that there is at least one passage in it which is absolute nonsense, is only to say of this Act what I am afraid may be predicted of perhaps nine out of ten Acts of Parliament which come before courts of justice for their consideration. Out of the terms of it, however, I have to collect, as well as I can, what the meaning of the legislature was. But upon going through those terms, beginning with the title of the Act, then going to the preamble, then to the various clauses, I find expressions used with a want of attention to consistency, the language sometimes indicating one thing, or leading to an indication of one thing, and in other clauses leading to a different indication. It is upon the balance of these different expressions that I am to come to the best conclusion that I can, and I must say, that the conclusion at which I have arrived is one which I have not formed without doubting whether another judicial mind might not place a different construction upon the same words." After going through the different portions of the Act in detail, his Honor thus concluded the portion of his judgment respecting the question of construction, "Looking at the whole of the facts as they existed at the time when this Act of Parliament was passed, as they are recognized or referred to in it, looking at the title of the Act, its preamble and the different sections to which I have referred, and having also read over all the other sections and found nothing in them material to the question, the conclusion at which I have arrived (although I cannot describe it as a certain conclusion, or one which I should feel confident that every other judge would form) is that it was not the intention of the legislature to limit the amount of money borrowed, to simply and

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and strictly such amount as was necessary merely to continue what was already begun, but that the corporation were justified in borrowing so much money as would go to pay the expenses of the whole of that which the title of the Act states that it intended to authorize, namely, the altering, extending and improving of the canal, one portion of which was actually done at the time."

By the petition of appeal, the Plaintiff complained of the decree, so far as it gave him no relief in respect of the application of part of the sum of 85,900*l.* in payment of sums expended upon or in relation to the canal prior to the date of the passing of the Act, and also so far as it gave the Plaintiff no relief in respect of the application by the corporation of the rents and profits of the canal in manner in the pleadings mentioned, and also so far as it gave the Plaintiff no relief in respect of the existing mortgages affecting the canal and other property of the Corporation of *Exeter*.

Mr. *Follett* and Mr. *J. V. Prior*, for the Appellant, cited *Barnes v. Racster* (a); *Budgen v. Bignold* (b); *Attorney-General v. Corporation of Norwich* (c).

Mr. *Teed*, Mr. *Rolt* and Mr. *Fooks* for the Respondents, referred to *Pontet v. The Basingstoke Canal Company* (d).

The LORD JUSTICE KNIGHT BRUCE said he was of opinion that as between the corporation and those whom the Plaintiff represented, the estates, which, with the canal tolls, were included in the mortgages created before the passing of the Act, were the first fund for paying those

(a) 1 Y. & C. C. C. 401.

(b) 2 Y. & C. C. C. 377.

(c) 16 Sim. 225, affirmed by

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(d) 3 Bing. N. C. 433.

those mortgages, and that, according to the true construction of the Act, it was not within the duty or powers of the corporation to raise money under the Act for payment of any mortgage existing previously. But his Lordship agreed with the Vice-Chancellor in not thinking it a matter of surprise that different minds should interpret differently such a collection of words as that of which the Act was composed.

*The* LORD JUSTICE TURNER was also of opinion that upon the true construction of the Act its intention was to empower the corporation to raise monies only for the purpose of completing the works which they had begun, and on which they had already expended a certain amount of money. After going through the material portions of the Act, and stating his Lordship's conclusion that it was beyond the powers given by it to raise money for the purpose of paying off the antecedent mortgages, his Lordship said that the next consideration was what ought to have been done with the excess of the monies which had been raised. The Act gave the corporation power to raise an unlimited amount, but it limited the application of the monies so to be raised, and created a trust of them. The effect, therefore, was that there was a certain amount of money legally raised, but unduly applied when raised. The consequence was that the money ought to be refunded to the persons from whom it had been taken. It was money legally raised under a trust, but not applied for the purposes of the trust. When real estate was sold for the payment of debts, and more was sold than was required for that purpose, so much of the money as was not required for the payment of the debts fell back again into the trust. So here the whole of the money which was raised was not applied to the purposes authorized, and a trust attached upon the portion which was not so applied for the benefit of the persons by whom it had

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had been contributed, and it ought to have been repaid to mortgagees rateably in proportion to the amount of their several mortgages. A part of those monies had, however, been actually applied by the corporation in paying off sums raised by them upon former mortgages, which included other estates than the canal, and the money so applied amounted to 34,000*l*. This application, not being a purpose warranted in the opinion of the Court by the Act of Parliament, and the monies so applied being in the opinion of the Court trust monies, the consequence must be that there was a lien upon those estates for the amount of the monies which had been so applied, subject to this restriction that, so far as those estates had been parted with by the corporation, and purchasers had acquired a title without notice of that lien, such a title could not of course be affected in this suit. Therefore, the Court could only give effect to the lien upon the estates of the corporation included in the prior mortgages so far as those estates remained in the hands of the corporation.

The declarations would, therefore, be, that the corporation were not authorized to apply any monies raised under the Act in paying off any securities which had been created before the Act, and that as between the corporation and the Plaintiffs the estates included in the mortgages so paid off, other than the canal property, were in the first place applicable to the payment of those mortgages that the monies which had been so applied ought to have been repaid to the mortgagees under the Act rateably, and in proportion to the monies advanced by them; and that such amount constituted a debt for which the mortgagees had a lien upon the estates (other than the canal property) comprised in the prior mortgages, so far as such estates were remaining vested in the corporation.

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GIBSON *v.* WOOLLARD.

**I**N this case an application was made to their Lordships on behalf of the Plaintiff (a mortgagee who had obtained a decree for a sale), on account of a difficulty felt by Vice-Chancellor *Stuart*, as to the power of the Court to dispense with laying an abstract of title before one of the conveyancing counsel appointed by the Court.

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Under the 56th section of the statute 15 & 16 *Vict.* c. 86, the Court has power to dispense with the rule, that an abstract of title upon a sale, under an order by private contract, shall be laid before the conveyancing counsel.

The property in question had been directed by the decree to be sold by public auction, but an offer had since been made to purchase it by private contract. The Vice-Chancellor considered, that under the 56th section of the statute 15 & 16 *Vict.* c. 86, it was a matter of course to refer the title to the conveyancing counsel (*a*).

Mr. *Bacon*, in making the application to their Lordships, said, that the Plaintiff's security was an insufficient one, and that the Plaintiff who was in these circumstances alone interested in the sale preferred taking the chance of objections being made by the purchaser to incurring the expense of a reference. He also said, that in a case before the Master of the Rolls in *June*

1853,

(*a*) 15 & 16 *Vict.* c. 86, s. 56,  
"Before any estate or interest shall be put up for sale under a decree or order of the Court of Chancery, an abstract of the title thereto shall, with the approbation of the Court, be laid before some conveyancing counsel, to be approved by the Court, for the

opinion of such counsel thereon, to the intent that the said Court may be better enabled to give such directions as may be necessary respecting the conditions of sale of such estate or interest and other matters connected with the sale thereof."



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1853, His Honor considered himself not bound to direct a reference in all cases to the conveyancing counsel.

Mr. *Godfrey* appeared for Defendants in the same interest as the Plaintiff.

The mortgagor had been served with notice of the application, and did not appear.

*The* LORD JUSTICE KNIGHT BRUCE.

We are of opinion that the Act of Parliament has conferred upon the Court authority to exercise its discretion in a matter of this description. With this intimation of our opinion, the matter had better be again mentioned to the Vice-Chancellor, who, after having before him the necessary information, will deal with it as he may think fit.

*The* LORD JUSTICE TURNER concurred.

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In the Matter of the PENNANT and CRAIGWEN  
CONSOLIDATED LEAD MINING COMPANY

AND

In the Matter of the JOINT-STOCK COMPANIES  
WINDING-UP ACTS.

MAYHEW'S CASE.

**T**HIS was an appeal from the decision of Vice-Chancellor *Stuart*, confirming that of the Master, and settling the Appellant on the list of contributories to the above Company.

The rules of the Company, which was carried on upon the cost-book principle, contained the following provisions:—

Rule 2. That the capital of the Company shall be divided into 8,000 parts or shares, and that no shareholder shall subdivide any part or share less than one 8,000th part or share.

Rule 4. The rules of a Mining Company, carried on upon the cost-book principle, provided that no shareholder should dispose of his shares without giving notice in writing to the purser of the intended transfer, and that every transfer should be according to a particular form provided for that purpose. The form was printed, and contained a notice that no transfer was valid or complete unless entered in the cost-book and acknowledged by the purser. A shareholder agreed to transfer his shares, and the proposed transferee stipulated that the transferor should pay the calls then due. They went together to the office of the Company, and deposited with the purser a transfer of the shares executed by them both and in the required form, and the transferor paid the calls, but no notice in writing was given of the transfer, nor was there any formal acknowledgment on the part of the purser:—

*Held*, that the transferee was properly placed upon the list of contributories.

*Held*, also, that he was liable to the debts of the Company incurred before the transfer.

*Semble*, by the Lord Chancellor, that where partnership articles provide that a partner may transfer his shares, they mean that he may so transfer them as to put the transferee in his place as to antecedent liability.

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Rule 4. That if any shareholder shall omit or refuse to pay any call for the space of one month after the same shall have been made, and due notice thereof given to such shareholder, then the share or shares of such shareholder shall be forfeited, and become the property of the remaining shareholders.

Rule 23. That no shareholder shall sell or dispose of his or her share or shares in these mines without giving notice in writing to the purser; such notice to be given or left at the offices of the Company, and to contain the name and address in full of the party to whom such share or shares is or are proposed to be transferred, and that every instrument of transfer shall be according to a form to be provided for that purpose by the Directors, which form may be had on application to the purser, and on payment of a fee of 2s. 6d. for each transfer, such fee being carried to the credit of the Company; and no transfer in any other form shall be valid or effectual.

Rule 24. That any shareholder may determine his or her responsibility or liability with respect to the affairs of these mines, upon his or her giving notice in writing to the purser of the Company for the time being, of his or her desire of retiring from the Company, and also upon depositing with the said purser the transfer of the share or shares held by him or her, and signing a relinquishment of all claims or demands on the Company in respect of such share or shares.

Rule 26. That the general accounts of the Company, for the current expenses of the mines, shall be made up and entered in the cost-book on or before the last day in each month.

Rule 27.

Rule 27. That the cost-book shall be kept by the purser, and be at all times open to the inspection and examination of the shareholders of the Company.

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The printed form for the transfer of shares was as follows :—

*Pennant and Craigwen*  
Consolidated Lead Mining Company.

Know all men by these presents

That I , of , in the county of , for a valuable consideration paid to me by , of , in the county of , do hereby bargain, sell, assign and transfer unto the said , eight-thousandth part or share of and in the mines called the *Pennant and Craigwen* Consolidated Lead Mining Company situate in the parishes of *Mallwyd* and *Llanymowddwy*, in the county of *Merioneth*, with the like part or share of and in all engines, tools, tackle, materials, ores, halvans, monies in the purser's or banker's hands; and all other the appurtenances to the said mine belonging, together with all and singular the dividends to be henceforth declared and payable upon or in respect of the said part or share, and all interest, profit, right, privileges and advantages whatsoever incident thereto, or to be derived therefrom; and all the estate, right, title and interest of me the said in and to the same eight-thousandth part or share belonging: To hold unto the said executors, administrators and assigns, subject to the same rules and regulations as indorsed, and on the same conditions as I held the same immediately before the execution hereof.

And I the said do hereby agree to accept and take the said part or share subject to the same rules and regulations as indorsed.

3 K 2

In

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In witness whereof we have hereunto set our hands  
 the                      day of                      , in the year of our Lord                      .

Signed and delivered by the )  
 above-named                      )  
 in the presence of                      )

Signed and delivered by the )  
 above-named                      )  
 in the presence of                      )

Offices No. 57, *Threadneedle Street, London.*

N.B.—No transfer is valid or complete until entered ~~in~~  
 in the cost-book and acknowledged by the purser.

The rules of the Company were printed on the back of ~~the~~ of  
 the form.

On the 13th *October* 1851, a Mr. *Sudbury*, who was ~~as~~  
 then the holder of sixty-three shares in the Company, ~~and~~  
 executed a transfer of them in the above form to the ~~the~~ e  
 Appellant, who also executed the transfer. It was in ~~in~~  
 respect of these shares that the Appellant was placed on ~~on~~  
 the list.

He disputed his liability on the grounds that there had ~~ad~~  
 been no valid transfer according to the rules of the Com-~~an~~  
 pany, and that even if there had been a transfer, it was ~~an~~  
 part of a contract, the whole of which was afterwards ~~ad~~  
 and before the transfer, avoided or rescinded.

It appeared that previously to the transfer there had ~~ad~~  
 been a meeting of the Company held on the 5th *Sep-*  
*tember* ~~tember~~

tember 1851, at which the following resolution was passed:—"That from the extraordinary course pursued by certain of the large shareholders in refusing under various pretences to pay their calls, there is no longer any hope of carrying on the undertaking with advantage to the general body of the proprietors, and that steps be accordingly taken for winding-up the affairs of the Company with as little delay as possible, and as, under the above circumstances, an equitable adjustment cannot be looked for otherwise than by due course of law, application be immediately made to effect that object before the Master."

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Mr. *Sudbury*, in his oral examination before the Master, after stating that he resided at *Halstead*, in *Essex*, deposed to the following effect:—

He was coming to *London* in the train with the Appellant, and on their journey they fell into conversation respecting the mines, in the course of which the Appellant advised Mr. *Sudbury* to get out of them. Mr. *Sudbury* had shares in another mine at the same time named the *Trescoll*, and the Appellant told him certainly as much about the mine as he knew, and more too. He advised Mr. *Sudbury* to get out of such things altogether. Mr. *Sudbury* said he should be very glad to do so, but did not know where there was a market for them just then. The Appellant thereupon made a proposal to take the shares, not only the *Craigwen* but the *Trescoll* shares. Mr. *Sudbury* at first said he might have them if he would pay the calls. The Appellant said he would not pay the whole, but if Mr. *Sudbury* would pay the calls on the *Craigwen* and *Pennant* shares, he (the Appellant) would pay them on the *Trescoll*. Mr. *Sudbury* agreed to this, and they obtained the transfer papers, which the Appellant himself filled up, and both he and Mr. *Sudbury* signed

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signed them at the Hall of Commerce. Mr. *Sudbury* went from there with the Appellant to pay the calls that were then due on the *Craigwen*, as he had agreed. They then went to the office of the *Pennant and Craigwen* Mining Company, and carried thither the transfers. When they arrived at the office Mr. *Taylor* (the purser) hesitated rather about the transfer, and said there was a great deal of confusion, and that there had been a meeting of the shareholders respecting the winding-up. When he began to tell them about the meeting, the Appellant said, "We know all about that." The transfer was then given to Mr. *Taylor*, to whom 2s. 6d. was then paid. Whether the deponent or the Appellant paid it, the deponent would not be positive. The shares in the *Trescoll* were never transferred, for this reason, that the calls were never paid by Mr. *Mayhew*. Mr. *Sudbury* told the purser not to transfer them until the calls were paid.

The purser deposed that the transfer was left at the office, but he could not charge his memory very correctly as to the conversation that took place. In his examination in chief he said, that on the first occasion of the Directors' meeting he laid it before them, which was his usual custom before he posted it into the book, and having no instructions from them to the contrary, he posted it into the book, and then transferred the shares in the transfer book from Mr. *Sudbury* to Mr. *Mayhew's* name, as appeared in the transfer book. He also stated that he afterwards forwarded to Mr. *Mayhew* notices of any meetings that took place. On cross-examination he said, that as to some of these matters he spoke from what he remembered to have been the usual course, and not from actual recollection, of the facts themselves.

The Appellant, on the other hand, deposed that he  
 had

had received no notice from the purser of the receipt of his transfer. On being cross-examined, he said that he never sent the transfer to the purser; that he called at the office with Mr. *Sudbury*, paid the 2s. 6d., and left the transfer; that he expected his notice in the ordinary way, but never received it; that the transfer was filled up in his handwriting on the day it bore date; that after the document was filled up he accompanied Mr. *Sudbury* to the office of the Company; that before or immediately afterwards they went to a bank in *Lombard Street* (said to be the bank of the Company); that at the office of the Company they saw Mr. *Taylor*, who was the secretary; that there was no other person representing the character of purser than Mr. *Taylor*; that Mr. *Taylor* told the Deponent nothing about the insolvency of the Company, but objected to receive the transfer; that Mr. *Sudbury* paid the same day at the bank in *Lombard Street* about 15*l.* on these shares; and that the Appellant went with him to make that payment; that it was not the Appellant who proposed originally to Mr. *Sudbury* to transfer these shares. That the Appellant was at the time of the transfer a solicitor at *Coggeshall*, where some shareholders lived, but that he had no shares in this Company before the transfer, although he formerly held some shares in a Mining Company, called the *Pennant Mining Company*, out of the consolidation of which, with the *Craigwen Company*, the above Company was formed, and that he was aware of the mode of transferring shares in that mine. That the two Companies were consolidated on the cost-book principle. That the Appellant did not hear of the resolution having been passed of the 5th of *September* 1851, to dissolve the Company until after the transfer. That on the occasion of his going to the office with Mr. *Sudbury*, Mr. *Taylor* said nothing to him about the state of the Company, except in connexion with his refusal to receive the transfer. That Mr. *Taylor* said he could

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could not take the transfer, as Mr. *Sudbury* must very well know, there being so much squabbling, and that it was very doubtful whether the Company would ever go on again, but that the Appellant did not say to Mr. *Taylor* "we know all about it." The Appellant, however, admitted that he knew that the Company was in a state of great confusion, but said that he did not know whether it was embarrassed or not. He said that after the transfer had been left, he was at the office of the Company for another purpose, and inquired what had become of the transfer, when Mr. *Taylor* replied it never ought to have been left.

The Appellant was originally settled on the list on the 22nd of *June* 1852. On the 21st of *November* 1853, he applied to the Master to review the settlement of the list in this respect. The Master directed that the application should stand over till the 24th of *November*, and that the official manager should summon Mr. *Sudbury* to show why his name should not be placed on the list. The case was again adjourned till the 5th of *December*, when the Appellant, Mr. *Sudbury*, and the purser, were examined, and deposed to the effect above stated.

Counsel were then heard for the Appellant for Mr. *Sudbury*, and for the official manager, and the Master refused the Appellant's application with costs, including the expenses of Mr. *Sudbury* and the purser as witnesses, and gave Mr. *Sudbury* his costs of being summoned as a contributory out of the estate.

Mr. *Malins* and Mr. *Cairns*, in support of the appeal. The transfer was not regular or complete. According to the 23rd rule, notice in writing to the purser was required. It was here wanting. There is also appended

to

o the form of transfer a note stating that no transfer shall be valid and complete until it is entered in the cost-book and acknowledged by the purser. No acknowledgment is proved to have been made. The facts in evidence show, that, so far from the transfer having been acknowledged, it was actually objected to, by the purser. But if the transfer had been formally sufficient and complete, it would have been void under the circumstances; or it now appears, that before it took place, a resolution had been passed to wind-up the Company, which resolution was not disclosed to the purchaser. Then, on the 13th of *October*, the vendor and purchaser went together to the purser, who said, as was the fact, that the circumstances of the Company were such that no transfer could with propriety be made. It is true the transfer was filled up, dated and signed by the Appellant, and if it had been accepted by the purser, the case against the Appellant might have been more plausible, but by the refusal of the purser the agreement for a transfer was in effect rescinded and nothing more was done.

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Mr. *Bacon* and Mr. *Hislop Clarke*, for Mr. *Sudbury*, and Mr. *Roxburgh*, for the official manager, contended that the transfer was complete, and that the Appellant was cognizant of all the circumstances of the Company.

They referred to *Straffon's Executors' Case* (a); *Cape's Executor's Case* (b), and *Fenn's Case* (c); and as to the propriety of summoning Mr. *Sudbury*, Mr. *Roxburgh* referred to the 99th section of the Winding-up Act.

Mr. *Malins*, in reply.

*The*

(a) 1 *De G., Mac. & G.* 576.

(c) 4 *De G., Mac. & G.* 285.

(b) 2 *De G., Mac. & G.* 562.

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It does not appear to me, or to my learned brother, that there is any serious doubt in this case. The main points in dispute are, first, whether there was a complete agreement between these parties for a transfer of the shares ; and, secondly, whether that agreement was put an end to. I think, upon the evidence before us, that there was a complete agreement between these parties. Mr. *Mayhew* was to take the shares both in the *Trescoll* and *Pennant* mines, and to pay the calls on the *Trescoll* shares, in consideration of the transfer of both sets of shares, and I think that this agreement was not put an end to. If it had been put an end to, Mr. *Mayhew* would have returned the transfer of shares which was in his hands at that time. On the question whether there has been a sufficient observance of the provisions of the Company's deed, I see nothing in this case to show that there has not. At the close of the transfer deed, it is said that no transfer shall be valid or complete unless entered in the cost-book, and acknowledged by the purser, but that can be nothing more than form, at all events ; and therefore no difficulty arises upon it. I think that the order was right.

*The* LORD JUSTICE KNIGHT BRUCE said, that the only doubt which he felt was, whether Mr. *Sudbury* should have been at all brought into the matter, and whether the whole contest ought not to have been one between Mr. *Mayhew* and the official manager.

Their Lordships were of opinion that the Appellant ought to pay one set of costs of the appeal, and ordered him to pay the costs of Mr. *Sudbury*, the official manager taking his out of the estate.

Upon

Upon the question being raised as to the time from which Mr. *Mayhew's* liability was to commence, in other words, whether he was bound to pay all debts generally, or only those incurred after he became a member of the Company, it was arranged that the point should be argued before the full Court.

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The case came on before the full Court of Appeal accordingly. Dec. 4.

Mr. *Malins* and Mr. *Cairns* for Mr. *Mayhew*.

They contended that Mr. *Mayhew* was only liable for the debts of the Company subsequent to the transfer. As between the transferor and the transferee of shares, there was no general equity for the latter to indemnify the former in respect of the claims of creditors; any equity which arose must be by contract either express or implied. In the present case, the facts made it clear that the intention of the parties was that the transferee should take free from antecedent liabilities. The 24th rule showed, that by complying with certain forms, liability might be got rid of, but this showed also, that otherwise there would be no discharge from liability. In *Fenn's Case* (a), the terms of the rule had been complied with, but that was not so here, and therefore the decision did not apply. They referred to and commented on *Ex parte Hawthorn* (b), *Ex parte Earl of Mansfield* (c), *Sutton's Case* (d).

Mr. *Bacon* and Mr. *Hislop Clarke* for Mr. *Sudbury*.

They submitted, that by the transfer, Mr. *Sudbury* had got rid of all liability, and relied in support of this

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(a) 4 *De G., Mac. & G.* 285.

(c) 2 *Mac. & G.* 57.

(b) 1 *Mac. & G.* 49.

(d) 3 *De G. & S.* 262.

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on the decision in *Fenn's Case* (a), the principle of which governed the present. They referred also to *Cape's Executor's Case* (b).

Mr. *Roxburgh* appeared for the Official Manager.

Mr. *Malins* replied.

*The LORD CHANCELLOR.*

I do not think that any of us entertain any doubt whatever that the purchaser, Mr. *Mayhew*, when he purchased his shares took them for better and for worse: he was to place himself exactly in the same position as between himself and the rest of the Company as that in which Mr. *Sudbury* stood. *Fenn's Case* (a) decided that a shareholder, acting under the twenty-fourth rule, absolved himself by surrendering his shares from all liability whatsoever; and by transferring them to another, he does exactly the same thing. The observations of Lord *St. Leonards* in *Cape's Executor's Case* (b), are in the strictest sense applicable to the present. That, it is true, was a case of partnership, a banking partnership carrying on business under the provisions of the Banking Act (7 Geo. 4, c. 46); but I do not think that that makes any difference. I have taken a very cursory glance at that Act, but I do not see any provision there that has any reference to the transfer of shares. It seems to me that when a partnership is constituted of several hundred persons, and its articles stipulate that any shareholder may transfer, the meaning necessarily is, that he may so transfer as to put the transferee in the place of him the transferor; otherwise it is holding out a nugatory inducement which can never be realized, because, if the meaning was that the transferee was to come in, taking previously

(a) 4 De G., Mac. & G. 285.

(b) 2 De G., Mac. & G. 562.

previously an account of all the dealings and transactions so as to have the transactions as between all the partners wound up to the moment of transfer, that would amount to no power at all: it is a transfer that never could be effected. It appears to me, upon the ground stated by the Lord Chancellor in *Cape's Executor's Case*, that the very circumstance that a party is authorized to transfer means, that he may transfer in the way that it was intended by Mr. *Sudbury* to transfer, namely, to substitute the transferee to all intents and purposes for the transferor. All this, I think, is strongly confirmed by the language of the transfer, which gives to the transferee all monies in the purser's hands or in the banker's hands, and everything whatever connected with the concern. But I confess, even if there had not been those words, the fact that a party was entitled to transfer his shares in a concern of this sort, carried on with a great number of shareholders, would of itself have carried an almost irresistible evidence that it meant he should transfer with liabilities begun and rights that were to come, in short, putting the transferee exactly in the place of the transferor. That view is entirely confirmed by the language of the form of the transfer which is here given; and therefore, considering the nature of the transaction, the terms of the rule and the terms of the transfer, and attending to the language of Lord *St. Leonards* in *Cape's Executor's Case*, I confess that I have come to the conclusion without any hesitation, that *Fenn's Case* and this stand upon exactly the same footing; and as it was decided in that case, that all liability on the part of the surrenderor of the shares ceased and merged in the Company, so here the liability of the transferor is entirely divested from him and passes to the transferee. I need only say that our decision in no respect affects the question as to the rights of parties outside the Company.

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*The LORD JUSTICE KNIGHT BRUCE.*

Upon the true construction of the document before the Court, I think that Mr. *Mayhew* is not entitled to have his liabilities limited as he desires.

*The LORD JUSTICE TURNER.*

This case has been argued upon the principles of ordinary partnerships, but those principles have no application to the point in dispute, because this is the case of a partnership with transferrable shares. In an ordinary partnership the shares are not transferrable, and the whole question here depends on there being a transfer of the shares.

The case has been put in two points of view—first, as between Mr. *Mayhew* and Mr. *Sudbury*; and secondly, as between Mr. *Mayhew* and the other partners in the concern. Now as between Mr. *Mayhew* and Mr. *Sudbury*, the transfer shows that Mr. *Mayhew* was to take, subject to all the conditions under which Mr. *Sudbury* held the shares; he must have taken, therefore, subject to the liabilities, unless he can show an express contract that some other persons should bear those liabilities; and as between him and Mr. *Sudbury*, it appears to me the contract was directly the other way; for the real arrangement between the parties was, that Mr. *Sudbury* should pay up the calls which had been made on the shares, which is a negative on his paying anything beyond the amount of those calls. Then as between Mr. *Mayhew* and the other shareholders, I take it the owner of a share must bear the liabilities which attach to it, so long as the share is an existing share.

*The LORD CHANCELLOR.*

I may observe, that when you speak of a transfer of a share in an ordinary partnership, you are using an improper

proper expression; there can be no transfer in an ordinary partnership; parties may dissolve an existing partnership, and form another with somebody else, and they may call that a transfer; but that is not at all what the instrument in the case before us contemplated. As to costs, Mr. *Mayhew* must pay them, including the hearing before the Lords Justices; but as this matter was brought before the full Court at the suggestion of the Lords Justices, we do not order him to pay the costs of this hearing. The other parties will have their costs of it out of the estate.

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IN this case, Vice-Chancellor *Wood*, on the 15th November 1854, made an order dissolving an injunction granted ex parte by the Lord Chancellor during the Long Vacation, his Lordship in granting the injunction having directed that the Defendants should be at

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short time before the expiration of the time limited by their Act for the compulsory purchase or taking of lands, gave a notice to treat for the purchase of the right or easement of making and for ever maintaining their Railway by throwing a bridge over a yard belonging to a manufactory: the owner, after the expiration of the Company's compulsory powers, gave a counter-notice requiring the Company to take the whole of the manufactory: the Company did nothing upon the notice and counter-notice for nearly twelve months; they then gave a notice for the purchase of the whole manufactory, and proceeded to take steps for summoning a jury to assess its value:—*Held*, on an application by the owner for an injunction, that, whether the original notice to treat was valid or not, the Court could not after the counter-notice which had been given by the landowner interfere with the proceedings of the Company, this decision being, however, without prejudice to any steps which the owner might take at law to stay or quash those proceedings.

A notice to treat for the purchase of such a right or easement as that above mentioned is not a notice warranted by the Lands Clauses Consolidation Act 1845, the word "hereditaments" used in the interpretation clause as a meaning of the word "lands" signifying corporeal hereditaments, and therefore not including a right of way. *Seemle, by the Lord Chancellor.*

Such a notice to treat as that above mentioned did not confer on the owner a right to give a counter-notice requiring the Company to take the whole of the manufactory, because a right of way could not be considered as part of the manufactory. *Seemle, by the Lord Chancellor.*

Where a valid notice has been given to take part of a house or manufactory, and on



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liberty to move to dissolve it before the Vice-Chancellor, and having acted in making the order simply because there was no other Equity Judge then accessible. The present application, which came on before the full Court of Appeal, was by the Plaintiffs, to discharge the order of the Vice-Chancellor and to restore the injunction.

The facts of the case are so fully noticed in the report of the hearing before the Vice-Chancellor, in the 1st Volume of Messrs. *Kay & Johnson's Reports*, page 34, that it is deemed unnecessary to repeat them. The following short statement is, however, inserted, to render the present report more intelligible to the reader.

The Plaintiffs, who carried on business as Oil and Colour Manufacturers, were the owners of a Manufactory and premises intersected by the *London* and *Blackwall* Railway, which was there constructed on arches. The Company having obtained power to widen their Railway, proposed to do this where it crossed the Plaintiffs' premises, not by taking any additional portion of the soil, but by putting buttresses at either end of their own property, and thus carrying the line over on a wider arch. For the purpose of enabling them to do this, they, on the 23rd *July* 1853, gave a notice to the Plaintiffs, purporting to be a notice under the Lands Clauses Consolidation Act 1845, stating what they proposed to do,  
 and

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that a valid counter-notice has been given to take the whole, the notice and counter-notice will be treated as constituting one notice for the purpose of enabling the jury to assess the value of the property forming the subject-matter of the notice and counter-notice. *Semble, by the Lord Chancellor.*

When a Company has given a valid notice to take land, it is competent to the landowner to apply at once for a mandamus to compel them to proceed to complete the purchase, and he cannot therefore at a subsequent time urge delay on the part of the Company as a ground for the interference of a Court of Equity with their taking proceedings to obtain the land. *By the Lord Chancellor.*

and that they were desirous of purchasing the easement of so making and maintaining their line of Railway. This notice was given only a few days before the expiration of the time limited by the Company's Special Acts for the purchase and taking of land; and after that time had expired, the Plaintiffs, on the 6th *August* 1853, gave a counter notice that they should require the Defendants to take the whole of their Manufactory. Nothing was done by either party until the month of *May* 1854, when a notice was given by the Company to the Plaintiffs that they intended to proceed to summon a jury to assess, not the value of the Manufactory but the value of the easement or right of way. The Plaintiffs then filed a Bill to restrain the Company from proceeding, on the ground that the Company had no right to take the easement or right of way without taking the whole of the Manufactory. The matter was heard by Vice-Chancellor *Wood* on a motion for an injunction, and his Honor, disregarding other objections, was of opinion that the Company were bound, if they took anything, to take the whole of the Manufactory; and he made an order accordingly, restraining them from proceeding except to take the whole of the Manufactory, the Plaintiffs being ready and willing and undertaking to sell the whole of the Manufactory. After that, and on the 12th *August* 1854, just at the commencement of the Long Vacation, the Company withdrew their notice of *May* 1854, and on the same day gave another notice that they intended to proceed to summon a jury to assess the value of the whole Manufactory. The Plaintiffs then filed a second Bill, stating the new notice, and praying for an injunction to restrain the Company from proceeding upon it.

On an ex parte application made to the Lord Chancellor on the 25th *August* 1854, in the temporary absence  
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of the Vacation Judge, his Lordship granted the injunction subsequently dissolved by the order of Vice-Chancellor *Wood* as above mentioned, and which order formed the subject of the present appeal.

The *Solicitor-General*, for the Plaintiffs, in support of the appeal.

He submitted, as the first point, that the Company's original notice to treat for the purchase of what was in fact a mere easement or right of way was invalid; that the view taken by the Vice-Chancellor, who had thought it valid and within the eighteenth section of the Lands Clauses Consolidation Act 1845, was not correct; his Honor had considered that the Lands Clauses Consolidation Act 1845 and the Railways Clauses Consolidation Act 1845 were to be taken together, and that a notice might be given under the former in reference to any purpose for the accomplishing of which power was given under the latter, and therefore, as the Railways Clauses Consolidation Act gave power to construct arches, a notice might be given under the Lands Clauses Consolidation Act to enable that object to be carried out; but it was submitted that the objects of the two Acts were distinct, the Lands Clauses Consolidation Act providing what a Company might do as between themselves and the landowners for procuring the land, and the Railways Clauses Consolidation Act dealing simply with what was to be done on the land when obtained. He contended, that the power to summon a jury to settle the amount of compensation was never intended to be applied to the case of an easement or limited user of land, and that it would be impossible for a jury to assess the value to be attached, to what, as in the present case, was a mere stratum of air. He referred, in support of his argument on this first point, to the sixth, sixteenth, eighteenth taken with the words prefatory to the sixteenth,

First, eighty-fourth and ninety-ninth sections of the Lands Clauses Consolidation Act 1845.

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As the second point in the case, the Company was not entitled, having regard to the facts which had occurred, to use the powers conferred by the Act for the purpose of summoning a jury. The compulsory powers had expired within a few days after the original notice was given; if that notice was invalid, as had been already contended, it was clear that the Company had no title, but even if not invalid, yet, as the Plaintiffs had a right to insist on the whole Manufactory being taken, the result must be the same, for the effect of the counter notice was to destroy the original notice, so that no contract existed at the time when the compulsory powers of the Act expired: it had never been decided that a Company, by giving a notice to the landowner and doing nothing more within the time limited by the compulsory powers of their Act, could afterwards, when the compulsory powers had expired, avail themselves of the right they otherwise would have had to summon a jury to assess the amount of compensation; and it could not be maintained, that the Company's right in the present case to resort to the compulsory powers of their Acts, was kept alive by the original notice. He referred, on this part of the case, to the eighty-fifth, ninety-second, and one hundred and twenty-third sections of the Lands Clauses Consolidation Act 1845, and mentioned and commented on, *The Queen v. The London and South Western Railway Company* (a), *The Marquis of Salisbury v. The Great Northern Railway Company* (b), *Sparrow v. The Oxford Worcester and Wolverhampton Railway Company* (c), *Adams v. The London*

(a) 12 Q. B. Rep. 775.

(c) 2 De G., Moc. & G. 94.

(b) 7 Railway Cases, 175.

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*don and Blackwall Railway Company (a), Skerratt v. The North Staffordshire Railway Company (b).* He also mentioned the case of *Doe dem. Armitstead v. The North Staffordshire Railway Company (c)* in reference to applications by the landowner for a mandamus to compel the Company to summon a jury after the expiration of the time limited for the compulsory purchase or taking of land.

[*The LORD JUSTICE TURNER* intimated, in the course of the argument, that the injunction granted on the first bill had been obtained on an undertaking by the Plaintiffs to sell the property in question, and that the Court would hardly grant an injunction even under new circumstances while that undertaking remained unperformed.]

Mr. *Steere* followed on the same side, and cited *The Queen v. The London and North Western Railway Company (d)*, and *Stone v. The Commercial Railway Company (e)*.

Mr. *Rolt*, for the Company.

He submitted, on the question of the right of the Company to give the original notice, that the general object of the Railway Acts was to render that compulsory on the landowner which, except for their provisions, would be optional; and if, therefore, a landowner could voluntarily convey such a right or easement as that in question, the Act would compel him on certain terms to do so. The Act authorized the construction of the railway in a particular manner, and gave power to take such

(a) 2 *Mac. & G.* 118.

(b) 5 *Railway Cases*, 166.

(c) 16 *Q. B. Rep.* 526: see

p. 536

(d) 3 *E. & B.* 443.

(e) 4 *Myl. & Cr.* 122.

such hereditaments as were necessary for that purpose. The notice in the present case was quite correct in form; it specified what the Company proposed to do, and stated their desire to obtain the hereditaments requisite for carrying it out; there was no ground for saying that such a notice could not be given. A case something similar had occurred in *Ramsden v. The Manchester &c. Railway* (a). He referred also to *Stamps v. The Birmingham and Stour Valley Railway Company* (b), and to *Sparrow v. The Oxford Worcester and Wolverhampton Railway Company* (c), and observed that in the Act for the railway now making underground from *Westbourne Terrace* to *Battle Bridge*, it had not been considered necessary to insert any special provisions for the purchasing of ground: the matter was left to the general power of the Railways and Lands Clauses Consolidation Acts, and no one ever supposed that the Company would be obliged to take and pay for every house under which the line passed. Even if the original notice had been invalid, the Plaintiffs had cured any defect by their counter notice which adopted the original notice, and founded on it a claim to be paid for the whole Manufactory.

With regard to the second point urged on the other side, it was impossible to understand how the counter notice should wholly defeat the notice to treat: the fact was, that the Plaintiffs had by that proceeding prevented anything being done under the first notice; they had said that they were willing to sell the whole property, and having done this they now come to the Court to ask that the Defendants might not be allowed to take the steps necessary for carrying out this agreement. The machinery provided

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(a) 1 *Exch. Rep.* 723.

(c) 2 *De G., Mac. & G.* 94.

(b) 2 *Phil.* 673.

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provided by the Lands Clauses Consolidation Act was ample to enable the Plaintiffs to obtain full compensation. The original notice was given in due time, and the only effect of the counter notice was to suspend the proceedings under it. The cases of *The Marquis of Salisbury v. The Great Northern Railway Company* (a), *Edinburgh and Glasgow Railway Company v. Monklands Railway Company* (b), and *The Birmingham and Oxford Junction Railway Company v. The Queen* (c), were precisely in point, showing that the notice to treat made a binding contract; the last case also showed that the Plaintiffs might have proceeded to enforce the contract, and thus removed any objection which they might otherwise have urged against the Company on the ground of the lapse of time.

He also insisted that it was impossible for the Plaintiffs to escape from the undertaking they had given to sell, and on the faith of which the injunction had been granted in the first instance by the Vice-Chancellor. He referred in the course of his argument to the third section of the first of the Company's Special Acts (d), to the sixth, thirteenth, fourteenth, sixteenth, thirty-second and thirty-third sections of the Railways Clauses Consolidation Act 1845, and to the sixteenth, eighteenth, twenty-first, twenty-second, twenty-ninth, fifty-eighth, eighty-fourth, and ninety-second sections of the Lands Clauses Consolidation Act 1845.

Mr. *Greene* followed on the same side.

The *Solicitor-General* replied.

He urged that there was a fallacy in the argument on the other

(a) 7 *Railway Cases*, 175. (c) 20 *Law J. (Q. B.)* 304.  
 (b) 12 *Decisions in the Court of Session* (2nd series), 1304. (d) See 1 *Kay & J.* p. 36.

other side in treating the easement in question as an hereditament which might be taken under the Lands Clauses Consolidation Act; it might be true that such a liberty or easement, being an hereditament, might if actually existing fall within the Act, but the easement in question was not an existing easement, it was one which the Company were creating, and the whole tenor of the Act showed that it was not intended to be applied to a liberty or easement for the first time created. He commented on the cases cited on behalf of the Defendants, and in reference to *The Marquis of Salisbury v. The Great Northern Railway Company (a)*, and the case before the Court of Session which was precisely similar to it, observed that the present case did not come within them, for they only decided that where the notice to treat was in all respects regular, an obligation was created which might be enforced in the ordinary manner even though meanwhile the time for the exercise of the compulsory powers had expired, while here the notice was irregular in itself, or if regular had not been prosecuted.

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*The LORD CHANCELLOR.*

This case came before me early in the Long Vacation in the country, upon an application for an injunction to restrain the Defendants, the Company, from proceeding to summon a jury or to get the value of the Plaintiffs' Manufactory assessed; and I may here remark that when a motion is made before a Judge *ex parte*, and without the benefit of hearing the other side, he is very liable to be misled by an erroneous impression, or he may not be put entirely in possession of all the views of the case, even although those who make the motion may be intending to represent it perfectly fairly. The facts of the present case, as they were originally represented to me, and

(a) 7 *Railway Cases*, 175.



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and which do not now appear to be materially varied, were these;—[His Lordship here stated the facts of the case to the effect above mentioned, down to and including the application made to his Lordship for an injunction on the 25th *August* 1854].

I cannot, under the circumstances just stated, blame myself for not having considered the case as fully as I have since been enabled to do, but it then appeared to me that the only ground upon which such an injunction as that asked could be granted, was not any personal equity on the part of the Plaintiffs, but a ground upon which this Court is very much in the habit of acting, namely, that it will not suffer persons, and more particularly powerful corporate bodies with whom it is very difficult to deal, to take proceedings which are of an illegal or even of a doubtfully legal character under their Acts of Parliament, if by so doing they place those against whom they are proceeding in a condition of peril from which it may be very difficult for them to extricate themselves: to grant an injunction in such cases is a course which has been repeatedly adopted by Lord *Cottenham* and other Judges. Thus, although there might be no equity on the part of these Plaintiffs, it appeared to me that, if they were right in contending that the proceedings were legally invalid, it would be a case of irreparable injury (using the word “irreparable” in the sense in which the Court uses it, that is, not that there would be no physical possibility of repairing it, but that it would be a very grievous injury indeed), to allow the Defendants to proceed; and for this reason, because, although the proceedings might be legally invalid, they were of an exceedingly summary nature, and the Defendants might, by the jury assessing some small sum as the value of the Manufactory, proceed on that to obtain a verdict and judgment, the result of which would

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be that the Sheriff would be ordered, *brevi manu*, to put the Plaintiffs out of possession, and to put the Company into possession of the property in question.

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Such being the state of things, whether I should act or not, depended in my mind upon whether, looking minutely at the law on the subject as far as I was able to do so, the Company were proceeding *ultra vires* or not, or, if it was a very doubtful case, whether restraining them would cause them much more injury than leaving them unrestrained would be likely to cause to the Plaintiffs. In such a case it is necessary to make a sort of comparative estimate of the injury that is to result from action to the one side, or from inaction to the other. I must frankly confess that, differing in this respect from the view that has been taken of the case by Vice-Chancellor *Wood*, I did come very strongly to the conclusion that the course the Company was taking was a course not warranted by law; I came to that conclusion on several grounds, but it will be sufficient to state one.

With all deference to the opinion of Vice-Chancellor *Wood*, I do still entertain very great doubt, to put it no higher, whether the original notice given by the Company was one upon which any thing at all could be done: my impression was, and still is, that a notice to take an easement such as that in question, is not a notice warranted by the Lands Clauses Consolidation Act. I do not know that it is necessary for me to give reasons, or enter into any detail of the grounds for this opinion, as in the view which I take of the case it will not be very material. The authority in the Act of Parliament is to take land, and the argument is, that looking at the interpretation clause, it is there stated that the word "lands" shall extend to messuages lands tenements and hereditaments of  
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any tenure, and that an easement or right of way is an hereditament. But the interpretation clause only says that this is to be the construction if there is nothing in the context which is inconsistent with it; and, looking at the whole context, my impression originally was, and it has not been removed, that an hereditament there means a corporeal hereditament, an hereditament which may be the subject of tenure which a right of way cannot be. It, therefore, appears to me, that a right of way is not an hereditament within the meaning of the Act. There is also another reason which I will mention. I think it was not the meaning of the legislature to enable Companies to take from a man a right of way through his property. If the circumstance of its being an hereditament enables a Company to take a right of way, why should they not give a notice to take a right of common or a right of turbary; but they cannot do this, though it might be very convenient for them sometimes to have such rights. It is, however, said, that no damage would result, because the jury would assess the full value; but the legislature did not mean that if I have a field free from a right of way, I shall be bound upon any compensation to substitute for that a field subject to a right of way: if it is to be taken from me it must be taken from me in solido. It is urged that this difficulty is met in the present case by the counter notice, which, according to the decision of the Vice-Chancellor, enables the Plaintiffs to have the entirety of the property taken, but there are two answers to that. With all deference to the Vice-Chancellor, I do not think that a right of way is any part of the Manufactory: no multiplication of a right of way indefinitely would ever constitute the soil; there may be one right of way, or a multitude of rights of way, but they form no part of the Manufactory. It is a right upon, in and connected with the Manufactory, but no part of it. I therefore do not think that there was any  
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right upon the notice of taking a right of way to give a counter notice to take the Manufactory. But if that were so, it would not remove the difficulty, for the question is not whether there was a right to take a right of way over this particular property, but whether that is the meaning of the Act generally. Suppose this had not been a manufactory or house, but a field or garden, there would then have been no power at all to give any counter notice: a counter notice can only be given where it is proposed to take part of a house or part of a manufactory, and there might be many cases in which it would be extremely inconvenient to the owner of the land, using the word very generally, to have it subjected to a right of way, and such a case would not be met by the provision as to a house or manufactory.

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I have thought it right thus to state the view which I originally took of the case, and which I am bound in candour to say has not yet been displaced. I do not, however, mean to say that I might not come to a different conclusion, and, as for the present purpose, it is not necessary further to consider the subject, I leave myself open to be satisfied upon further reflection that the view I have expressed is wrong.

Other legal difficulties about the proceeding in question have been adverted to, and I will notice them very shortly. It was said that the original notice, even if good, was annihilated by the subsequent counter notice, and so that a new notice was rendered necessary. I thought there was something in that argument at the time it was addressed to me in the country, though I am now disposed to admit that that view is not correct. Here again I do not mean to bind myself, but my present impression is, that when a notice has been given, if it be a good notice, and a counter notice given, if it be a good counter notice, that  
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that is a substitution of the counter notice for the original notice, and that the jury would have jurisdiction to proceed on the amalgamated notices so constituting one notice. That is the construction which I think I should put on that part of this case if it were necessary now to decide it; it is not however necessary, for reasons which will presently appear.

I was also struck with the great length of time which has elapsed, but the argument drawn from that against the Company has been entirely removed from my mind by the case in the Queen's Bench, *The Birmingham and Oxford Junction Railway Company v. The Queen* (a), of which I was not aware at the time the matter was originally before me, and which I think was not then mentioned to me. That case has decided that after the notice to take has been duly given by the Company, if it is a good notice, it is competent to the party to whom the notice is given immediately to apply for a mandamus compelling the Company to proceed; and, therefore, I do not think it lies in the mouth of the Plaintiffs here to complain of any delay, the delay being as much their own as the delay of the Company. I thus think, that the arguments drawn from delay and the effect of the counter notice are removed, but that the argument as to the invalidity of the original notice is not removed.

On the whole of the case, however, my opinion with regard to the injunction is, I confess, altered from what it was when the matter was first before me, and I think there ought to be no injunction. My opinion is altered, not because upon hearing the argument on both sides any impression has been removed, but because a new view of the case has been presented to my mind, which I think

(a) 20 *Law J. (Q. B.)* 304.

I think shows to me that, even if I am right in my notion that the original notice was legally invalid, this Court ought not to be active to assist the Plaintiffs, and it is on this ground, and this ground only, that I concur in the judgment of the Vice-Chancellor. The question is, assuming for the present argument the notice to have been invalid, whether the Court shall be active in stopping the Defendants from doing an act which may occasion great injury to the Plaintiffs before they can get themselves effectually set right: I think not, because, whatever may be the invalidity of the notice, the Plaintiffs gave a counter notice which unquestionably had, or might reasonably have had, the effect of leading the Company to suppose that they might safely proceed with their works, for that whenever they were so minded they could get the Plaintiffs' property by virtue of that counter notice. The Plaintiffs, in fact, stated that though not willing to sell the right of way claimed by the Company, they were willing to sell the whole of the Manufactory. Twelve months elapsed before the Company gave the notice on which they are now proceeding, but I do not think that the Plaintiffs can complain that they may be put to hardship by the previous invalid proceedings, when they have been leading the Company for all this time to act upon the notion that they were ready and willing to part with the whole of the Manufactory. This decision will not at all impede the Plaintiffs from taking steps at law, either to stop the Defendants' proceedings, or to quash them when concluded, as they may be advised. My opinion is, that they are disentitled to ask for relief here by reason of their conduct, and for that reason I think that the Vice-Chancellor was perfectly right in dissolving the injunction.

I need hardly say, that when I granted the injunction I granted it on terms which made it not only open to, but the duty

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duty of any Vice-Chancellor, to deal with it just as if it had been an injunction granted by himself. The Vice-Chancellor heard the case very fully, and came to a conclusion which is the same in result as that at which I have arrived, namely, that no injunction ought to have been granted; he consequently dissolved the injunction, and properly with costs, because the matter was to be dealt with just as if it was the refusal of an original motion to grant an injunction: the case has now been brought here, and in my opinion the appeal motion must be dealt with in the same way, and must be dismissed with costs. If, however, the Plaintiffs are minded to agree to have the whole matter settled without further proceedings by a reference to the Judge's Clerk, or in any mode that can be suggested, that may vary the question of costs, but if no arrangement of that sort is come to, I am of opinion that this motion ought to be dismissed with costs.

*The LORD JUSTICE KNIGHT BRUCE.*

Upon the question raised in this case, whether the Plaintiffs ought to be considered as bound by their undertaking, embodied in the order of the 4th of *August* last, or are entitled to be relieved from it, they ought not, I think, to be prejudiced by the form of their notice of motion before us, so as to lose any benefit that they might have had if their application here had, in a regular manner, sought the discharge of the undertaking, as well as what it does seek. This, indeed, has been already settled, and the argument was on that footing. It seems to me, however, that, upon the substance and merits of the controversy, the undertaking ought not to be disturbed, and that it was right in the particular circumstances of the case for the Vice-Chancellor to make it a condition of granting or continuing in *August* last, in favour of the Plaintiffs,

Plaintiffs, the injunction which he then granted, or continued in their favour that the undertaking should be given. I think the Plaintiffs' counsel, if of a different opinion, might well have declined to accept the injunction upon those terms and appealed; nor do I doubt that the Lord Chancellor or the Lords Justices would have taken and heard the appeal without delay, and in the mean time protected the Plaintiffs. The undertaking must, I conceive, be regarded as willingly and knowingly given, and as having materially affected the subsequent conduct of the Defendants, who appear to me, I repeat, now entitled to the full advantage of it. I agree that it is silent as to price, nor provides in terms the means of ascertaining the amount. But the true construction must, I apprehend, be, that the amount was to be ascertained in one of the modes provided by the Lands Clauses Act, or to be fixed by the Court of Chancery. To say that the performance of the undertaking was to be merely at the Plaintiffs' option, or that they were to fix the price at their discretion, would, I conceive, be absurd. The case of a mere agreement to sell without mentioning a price or appointing any mode of ascertaining it is, in my judgment, essentially difficult. The Defendants are here Respondents merely, nor ask anything of the Court. They have by their counsel at the bar, however, submitted either to proceed on their original plan, so as to avoid touching the Plaintiffs' soil, or at the Plaintiffs' option to buy the whole Manufactory, and in either case to allow the amount of compensation or purchase-money to be ascertained in any manner that we shall consider just. In this state of circumstances, I think it impossible to grant the Plaintiffs any injunction upon their present application, unless electing in which way the Defendants shall proceed with their works, the Plaintiffs will accede to some reasonable and effectual mode of ascertaining between them, and the Defendants the amount

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amount of compensation or purchase-money to be paid to the Plaintiffs.

*The* LORD JUSTICE TURNER.

This case involves many important points of law, but, in my opinion, it is not necessary for us to decide those questions, and I give no opinion upon them.

The question whether the order made by the Vice-Chancellor ought to have been discharged, and whether the injunction ought to have been maintained may, in my judgment, be well disposed of, without a reference to any of the points which have been most elaborately raised in the argument.

On the 23rd *July* 1853, the Company gave notice to take what is described in the notice as an easement, and in truth it is no more than a stratum of air which passes over the Plaintiffs' Manufactory, and thereupon the Plaintiffs being served with that notice, on the 6th of *August* 1853, gave a counter notice, by which they required the Company to take the whole of their Manufactory. That counter notice is in these terms: "The whole of the foregoing premises, with the exception of the two arches, let to *Thomas Rooke*, are in our own occupation, and used by us in our business. We have laid out a considerable sum of money in erecting buildings on the foregoing premises, and in establishing a lucrative business therein; and we have a large and valuable stock in trade and plant, and we are under various contracts to supply goods of our own manufacture for stated periods of time. We require the Company to purchase and take the whole of the foregoing premises, and our estate and interest in the lands, warehouses, manufactory and premises, including the fixtures and plant therein and thereon, and to make us compensation in damages for the goodwill of our business

business and the loss we shall sustain by reason of removal of our stock, sale of horses, carts, waggons, &c., and our inability to perform contracts for the supply of goods, &c., and other special damages, and we claim the sum of 40,150*l*.

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Now, that counter notice having been given by the Plaintiffs on the 6th of *August* 1853, the matter rested until the 4th of *May* 1854, when the Company served the notice to summon a jury, to ascertain the price to be paid for the easement which they had mentioned in their notice of the 23rd of *July* 1853. Upon the notice to summon the jury being served on the 4th of *May* 1854, there followed a letter of the Plaintiffs' solicitor of the 10th of *May* 1854, in these terms :—" My clients consider that they are entitled to call upon the Company to purchase the whole of the manufactory under the 92nd section of the Lands Clauses Consolidation Act." Receiving no answer to that letter, the Plaintiffs' solicitor again, on the 19th of *May*, writes in these terms :—" I now understand from your last letter that the Railway Company do not intend to take my clients' manufactory and premises as claimed by them under their notice of claim on the 6th of *August* 1853 served on the Company. I beg to inform you that they intend to file a bill." Accordingly the bill was filed. That bill sought for an injunction to restrain the Company from proceeding on their notice of the 23rd of *July* 1853.

Now, no doubt, that bill raises every objection which can be raised as to the validity of the notice. It especially objects to the form of the notice and to the time. But it also raises this point, that, under the provision of the 92nd section of the Act of Parliament it was incumbent upon this Company to take the whole of the Plaintiffs' manufactory; and looking at the allegations in this

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bill from the beginning to the end of it—I refer particularly to the allegations which are contained in the bill as to the trade carried on by the Plaintiffs, and the damage and injury to their trade,—I think it is impossible to doubt that this bill was filed for the purpose of compelling the Defendants to purchase the whole of the Plaintiffs' manufactory. But even supposing that not to have been the object of the bill, still there remains this fact, that on the 6th of *August* 1853, the Plaintiffs had served the Company with notice that they required the Company to take the whole of the manufactory. Now what was the effect of that notice? Was it not necessarily to lead the Defendants, the Company, to believe that the Plaintiffs were willing and able to sell the whole of that manufactory, and that they the Company might therefore proceed with their works upon the assumption that they would be enabled by the acts of the Plaintiffs to acquire this manufactory and complete the works? And accordingly, from *May* 1853, the works of this Company must have been, from the nature of the undertaking, proceeding,—and proceeding without any interruption on the part of the Plaintiffs.

The Plaintiffs then come to this Court for an injunction to restrain the Company from at all acting upon the notice of the 6th of *August* 1853. Now the question first is, ought this Court in that state of circumstances to have granted an injunction to restrain the Company from proceeding without putting the Plaintiffs upon terms? I am most clearly of opinion that it ought not. The Plaintiffs, by their own conduct, have created a counter equity against themselves by having given the notice that they were willing to sell. They had led the Company into the position of carrying on the works upon the faith that they would complete that contract; and in my opinion, therefore, (and I give my opinion upon the assumption  
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that we are now dealing with the notice of motion to discharge the undertaking, and apart therefore from any question of form,) it was the bounden duty of the Court upon that application to put the Plaintiffs upon the terms of conveying and selling to the Company the property which by their notice they had offered to sell. I think, therefore, that the undertaking was properly introduced into the Order of the 4th of *August* 1854.

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It is then to be considered, what is the effect of the undertaking? I think that the Plaintiffs by that undertaking are in equity bound to sell and convey to the Company. The Company upon paying the price to be ascertained become owners in equity, subject to the payment of that price. Then how does the case stand as to the present application? The Plaintiffs have a legal title; they come into Court for equitable interference in support of their legal title, but they come here against the party who by their own contract and their own undertaking has the equitable title, and who would have had the legal title if they had performed their undertaking.

In this state of circumstances I think that the Court can give them no assistance unless they perform their undertaking, and that the order therefore ought to be in these terms,—that the Defendants having offered either to execute the work in the manner first intended, and to make compensation for the injury which may be occasioned thereby, or to purchase the manufactory, and the Plaintiffs refusing to agree to such compensation or price being ascertained in the mode provided by the Act, or in such other mode as this Court may think fit, there can be no order upon the motion except that the Plaintiffs pay the costs.

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The HULL and SELBY RAILWAY COMPANY *v.*  
The NORTH-EASTERN RAILWAY COMPANY  
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WAY COMPANY.

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Before *The*  
LORDS JUSTICES.

A Railway Company, having agreed to let its line to another, which had taken possession under the agreement, filed a specific performance bill against the other, which thereupon gave notice that it would pay the rent into Court. The Plaintiffs then gave the Defendants notice, that, unless the rent were paid to the Plaintiffs, interest would be claimed on it under 3 & 4 Will. 4, c. 42, s. 28. The Defendants obtained *ex parte* an order that they might be at liberty to pay the rent into Court, and paid it in accordingly:—*Held*, that they thereby obstructed the recovery of interest at law, and that the Court had jurisdiction to order payment of interest.

THIS was an appeal from a decision of Vice-Chancellor *Stuart*, directing payment out of Court to the Plaintiffs of a sum of 33,498*l.* 2*s.* 5*d.* paid into Court by the Defendants, the *North-Eastern* Railway Company on the 11th of *August*, with interest from the 2nd of *August* and costs.

By an agreement dated the 30th of *June* 1845, the Plaintiffs agreed to lease their railway to the *York and North Midland* Railway Company (which afterwards became, by Act of Parliament, merged in the *North-Eastern* Railway Company) for 1,000 years, at a rent of 50,000*l.* per annum, subject to be increased in certain events which had happened. Subsequently the *Lancashire* and *Yorkshire* Railway acquired an interest under this agreement.

The *York and North Midland* Railway Company had been in possession of the Plaintiffs' line since the 1st of *July* 1845, under the agreement, and paid the reserved rent up to *January* 1854, but in consequence of a dispute as to whether the lease was to be made to both the Defendants' Companies, or to the *York and North Midland* Railway Company alone, no lease was actually made, although the Plaintiffs had frequently applied to both Companies to perform the contract.

Early

Early in 1854 the Plaintiffs filed a bill for specific performance of the agreement. On the 1st of *July* 1854, half a year's rent, amounting to 35,000*l.*, was due, and on the 31st of *July* the Secretary of the *York and North Midland* Railway Company sent a letter to the Plaintiffs' secretary, stating, that in consequence of the pending suit the Directors of the former Company had ordered the amount of the rent, less income tax, to be paid into the Court of Chancery, to be subject to the orders of the Court.

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In reply to this notice the Plaintiffs' secretary on the 2nd of *August* sent a letter, stating, that no order of the Court of Chancery had been made for payment into Court, and that, as the suit did not affect the Plaintiffs' right to the rent, he was instructed to demand the immediate payment, and to give notice to the *York and North Midland* Railway Company that if the rent was not forthwith paid interest would be claimed on the 35,000*l.* from the date of that letter until payment, pursuant to the 28th section of the Act 3 & 4 *Will.* 4, c. 42 (a).

On the 3rd of *August* the *York and North Midland* Railway Company obtained ex parte an order in the suit that they might be at liberty on or before the 16th of *August*

(a) "That upon all debts or sums certain, payable at a certain time or otherwise, the jury, on the trial of any issue, or on any inquisition of damages, may if they think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment: provided, that interest shall be payable in all cases in which it is now payable by law."

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*August* to pay 33,498*l.* 4*s.* 5*d.*, being the rent, less income tax, into Court, to the credit of the cause, subject to further order.

On the 11th of *August* they paid that amount into Court accordingly, and on the 13th of *August* communicated the fact to the Plaintiffs, the Court having then risen for the Vacation.

The Plaintiffs presented a petition for payment of the money out of Court, and that the Defendants, the *North-Eastern* Railway Company (in which the *York and North Midland* Railway Company had in the meantime become merged under an Act of Parliament affecting the new Company with the liabilities of its constituent dissolved Companies), might pay interest thereupon at the rate of 4*l.* per cent. from the date of the letter of the 2nd of *August*, and the costs of the application consequent thereupon. The Vice-Chancellor on the 3rd of *November* ordered accordingly, and the Defendants, the *North-Eastern* Railway Company, appealed.

Mr. *Bacon* and Mr. *Hobhouse*, for the Appellants.

Mr. *Malins* and Mr. *Schwyn*, for the Respondents, were not called upon.

*The* LORD JUSTICE TURNER.

This is an appeal from an order directing the *North-Eastern* Railway Company to pay interest on a sum due in respect of rent which they have paid into Court. It is not suggested that the order does not do substantial justice, but it is said that there is no jurisdiction in this Court to order payment of interest upon the sum paid in. Whether there would have been any such jurisdiction if the parties had not acted as they have done it is

not

not necessary to consider. But the Company have thought proper to pay this rent into Court, and I think it is reasonably clear that by so doing they have prevented the Plaintiffs from recovering interest upon the rent at law, because all that the statute 3 & 4 *Will.* 4, c. 42, s. 28, does is to authorize the jury to allow interest upon the trial of "any issue or any inquisition of damages." It does not give a separate right of action for the interest. That at least is the view which I take of the Act. It is said, however, that the Defendants were justified in paying the money into Court by the provisions of the private Act of Parliament, which enacts, that the covenants of the lease shall be performed by them, subject to the order of this Court. I take that to mean that they were to perform the covenants unless the Court should otherwise direct. These Defendants have, in my opinion, paid this money into Court without authority. By so doing they have at all events impeded if they have not defeated the right to recover the interest at law, and I take it that this Court has jurisdiction in cases where parties by taking advantage of its process have interfered with legal rights (*a*). I think, therefore, the Court has jurisdiction in the present case, and about the justice of the order there can I think be no dispute.

*The* LORD JUSTICE KNIGHT BRUCE concurred.

(*a*) See *Pultney v. Warren*, 6 *Ves.* 73; *Bond v. Hopkins*, 1 *Sch. & Lef.* 434.

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Before The  
LORDS JUSTICES.

Where a Plaintiff claiming a copyright in a work of a foreigner obtained an injunction, on giving an undertaking to abide by any order the Court might make respecting damages, and the law was, pending the suit, finally settled against the existence of such a copyright,—*Held*, that the Defendant was entitled to have the damages sustained by him ascertained as correctly as practicable and paid, and that a mere dismissal of the bill with costs was not a sufficiently accurate assessment and award of damages.

## NOVELLO v. JAMES.


THIS was an appeal from the decision of Vice-Chancellor *Stuart* upon two motions, one on behalf of the Plaintiff for the dismissal of his bill without costs, the other on behalf of the Defendant for payment by the Plaintiff of damages which the Defendant had sustained, by reason of an injunction obtained by the Plaintiff, on giving the usual undertaking to abide by any order which the Court might make with respect to damages. The question in the cause, which had in effect been disposed of pending the suit, by the recent decision of the House of Lords in *Jefferys v. Boosey* (a), was as to the copyright of *Mendelssohn's* "Lieder ohne Worte," which the Plaintiff, Mr. *Joseph Alfred Novello*, had published in *London* for the composer in 1832. The pieces were composed in *England*, and on the 9th of *September* 1837, the Plaintiff had purchased the copyright. It was to restrain the publication of the compositions in a periodical work called "The Pianista" that the bill was filed.

On the 15th of *December* 1851, an injunction was obtained, on an ex parte application to the then Vice-Chancellor *Knight Bruce*, and on an undertaking on the part of the Plaintiff to abide by the order of the Court as to damages. On a motion to dissolve the injunction, it was continued upon the Plaintiff's continuance of the undertaking.

On the 1st of *August* 1854, *Jefferys v. Boosey* was decided

(a) 4 H. of L. Cas. 815.

decided by the House of Lords, and shortly afterwards an application was made and granted without opposition to dissolve the injunction. On the 15th of *November* 1854, the motions now under appeal were made.

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The Vice-Chancellor *Stuart* decided that the proper damages would be the costs of the suit, which his Honor ordered to be paid by the Plaintiff on dismissing his bill, and made an order accordingly on both motions.

Mr. *Malins* and Mr. *Charles Hall*, in support of the Appeal.

For three years the Plaintiff has, by means of his undertaking, been in the enjoyment of a monopoly to which he was not entitled, and for the same period the Defendant has lost the profits which he would have derived from the exercise of what has now been determined to be his right. This loss the Plaintiff assesses at 3,000*l.*, and that amount, unless the assessment can be successfully disputed, he ought to receive. The order cannot be right, as there is no evidence to support such an assessment of damages as that made by it. It might have been right to dismiss the bill without costs, on account of the doubtful state of the law, but the question of damages was a distinct one.

Mr. *Bacon*, Mr. *Elmsley* and Mr. *C. M. Roupell*, for the Respondent.

There are no means of arriving at a correct assessment of damages, and the Vice-Chancellor took the only means in his power of doing justice between the parties. There would, of course, be no jurisdiction to award damages but for the undertaking. But that undertaking was merely to submit to such an order as the judge of the branch of the Court to which the undertaking was given should consider just. The undertaking was given  
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to the Court, not to the Defendant, and the Court has said what would satisfy it. An appeal from such an award should meet with no more favour than an application for a new trial on the ground of insufficient damages, which it is well known rarely succeeds. The Defendant's own assessment supposes that he and the Plaintiff would have been the only publishers, which is an obvious fallacy.

They referred to *Robinson v. Rosher* (a); *Sutton Harbour Improvement Company v. Hitchens* (b).

Mr. *Malins*, in reply.

The LORD JUSTICE KNIGHT BRUCE.

Whatever, at the time when this cause was commenced, and when the injunction was continued, may have been the amount of difference between judicial opinions upon the question on which the Plaintiff's title depended, the recent decision of the House of Lords in another case renders it incumbent on the Court of Chancery to say that he has not nor had any ground of suit; and it would, I conceive, be unjust to the Defendant to disregard or not to give effect to the undertaking which was the price at which the Plaintiff accepted the continuance of the injunction, instead of accepting or proposing that the Defendant should be unrestrained and keep an account until the hearing or further order.

Upon the present motion, if his Honor the Vice-Chancellor had had before him all the elements and materials necessary and obtainable for the purpose of enabling an opinion to be formed as to the amount of damage sustained by the Defendant in consequence of the injunction, I should have felt even more reluctance than

(a) 1 Y. & C. C. C. 7.

(b) 15 Beav. 161.


than the great reluctance which I do feel against permitting a continuance or prolongation of this unlucky litigation. But I think that his Honor had not, and, however unwillingly, I must, I fear, say, that the Defendant has a right to insist on having ascertained, either by an officer of the Court of Chancery, subject of course to appeal, or by a jury, what, if any, is the quantum of damage that he has suffered.

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The Plaintiff, on the injunction being continued, came under an undertaking to abide by any order the Court might make as to payment of damages consequent upon the order for an injunction and the order continuing such injunction. The simple question seems to be, whether any order ought now to have been made by the Vice-Chancellor on that undertaking by exercising his discretion upon it or not. The Plaintiff sued upon a title at the time doubtful, there being conflicting decisions upon it by the superior Courts of law, and therefore it was that, in granting the injunction, the Court required from the Plaintiff this undertaking; and, the result having ultimately turned out unfavourable to the Plaintiff by the decision of the House of Lords against such a title, it seems to follow that it is the duty of this Court to enforce the undertaking. The question, therefore, resolves itself into whether the order made by the Vice-Chancellor satisfies the exigency of the case. Upon the best consideration that I have been able to give, I do not think that it does. First, I think that this question of damage is a separate matter entirely from the question of the costs of the suit, and I very much doubt whether the question of the costs ought to have been mixed up with the question of the amount of damages sustained by the Defendant. There is the further difficulty, that there are no materials to enable the Court to ascertain the amount of damages, or whether

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whether payment of the defendant's costs, supposing him not otherwise entitled to them, is a just measure of the amount of damage he has sustained.

I think, therefore, that the Vice-Chancellor's order cannot be supported, and that there must be either a reference to the Chief Clerk to ascertain the amount of damage sustained by the Defendant, or that that question must be put in course of trial at law by a jury.

The matter is understood to have been ultimately arranged between the parties.

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An agreement
 between a
 Railway Com-
 pany and Rail-
 way con-
 tractors (who

THESE were the appeals of the Plaintiffs from a decision of Vice-Chancellor *Wood*, allowing two demurrers, reported in the first volume of Messrs. *Kay & Johnson's Reports* (a).

The

(a) Page 186.

were also landowners), for the construction of a branch Railway, provided that the Company should find the land within a reasonable time and build the stations; that the contractors should give a bond to the amount of 50,000*l.* to secure the performance of the contract, and undertake to execute the works for a double line of Railway, and the ballasting and permanent way for a single line, according to the terms of a specification, to be prepared by the engineer for the time being of the Company; that the Company should work the branch in a reasonable and proper manner as compared to the remainder of the main Railway; and that in case of difference as to working, the same should be settled by arbitration; and that any of the details of the arrangement, in case of difference, should be determined by a referee to be appointed by the Solicitor-General for the time being:—*Held*, on demurrer, that this agreement was too vague, obscure and uncertain to be enforced in a specific performance suit, and that the stipulation as to the execution of a bond could not be enforced apart from the rest, being merely an incidental and subsidiary part of the agreement, and not within the principle of *Lumley v. Wagner*, where the negative stipulation was a distinct and substantive part of the contract.

Though the Court may execute an agreement framed in general terms where the law will supply the details, yet if those details are to be supplied, in modes which cannot be adopted by the Court, there is no concluded agreement which can be enforced in equity.

The following is a short outline of the allegations in the bill. The Plaintiffs had authority by an Act of Parliament, passed on the 20th of *August* 1853, to extend and make a deviation from the *Pembroke* line of their Railway. Before the Act was passed, and pending its progress through Parliament, the Defendants, who were Railway contractors and also landowners on or near the projected deviation, entered into the following written agreement with the Plaintiffs:—" *South Wales* Railway—*Pembroke* Branch—Memorandum between the *South Wales* Railway Company and Mr. *Parson*, acting for Mr. *Wythes* and Mr. *Tredwell*. The Company to find the land within a reasonable time, and build the stations. The contractors to give a bond to the amount of 50,000*l.* to secure the performance of their contract, and to undertake to execute the works for a double line of Railway, and the ballasting and permanent way for a single line according to the terms of the specification to be prepared by the engineer of the Company for the time being of for the sum of 290,000*l.*, to be complete ready for opening by the 1st of *December* 1855, to be paid in a new stock to be created, bearing 5*l.* per cent. interest from the day of the line being so ready for opening, such interest being derived from the receipts upon branch line, 60 per cent. of such gross receipts being devoted to such purpose, and an additional 10 per cent. of such receipts, making 70 per cent. on all traffic over the said branch which shall pass to and from or beyond *Caermarthen*, or any more distant place on the main line, the residue of the gross receipts upon the said branch line being retained by the Company for working the branch, any arrear of the interest of 5*l.* per cent. in one year to be made good out of any surplus in any following year or years until the stock is redeemed, the *South Wales* Railway Company to have the option of redeeming such stock or any portion thereof at any time after the opening of the branch upon years' notice

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at par, paying any arrear of interest, if any be due as above on the stock so redeemed; and it is further agreed that the Company shall positively redeem such stock at par, either by payment in cash or at the Company's option, by exchanging or converting such stock into ordinary shares of the Company, but without paying any arrears of interest whenever the *South Wales* Railway Company's ordinary shares are above par, and shall have remained so for a continuous period of not less than six calendar months, or during such period shall have averaged half per cent. above par: provided that at the same time a sum of 100,000*l.* at the least shall have been paid up and bonâ fide expended upon the works of the *Milford Haven* Docks, to be duly certified by the engineer in chief for the time being of the said dock company. The Company to work the branch in a reasonable and proper manner as compared to the remainder of the *South Wales* Railway, in case of difference as to working the same to be settled by arbitration. Any of the details of this arrangement, in case of difference, to be determined by a referee to be appointed by the Solicitor-General for the time being on the application of either party, such referee to draw out and settle on behalf of both parties the documents necessary to carry it out. The arbitrators, under working clause, to have the power of considering whether the mode of working the *Pembroke* branch is reasonable, having reference to the Company's mode of working the branch to *Neyland*, and if the arbitrators make any award both parties to abide by it." The bill stated that the specifications of Mr. *Brunel*, who was the Company's engineer, were of a kind well known to the Defendants and contractors generally, and that soon after the date of the agreement Mr. *Brunel* commenced the specification for this undertaking, and had several interviews with the Defendants respecting it, and had since completed the specification. There was also a charge,
that

that the Defendants, as landowners, had obtained great benefit from the Act having been obtained, obliging the Plaintiffs to make the deviated line, and that but for the contract the Plaintiffs would not have obtained the Act or come under the obligation which was enforced by a provision in the Act for the suspension of dividends. The prayer was for a specific performance of the contract.

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Mr. Rolt, Mr. Giffard and Mr. John Karlake, in support of the Appeals.

The decision of the Vice-Chancellor proceeded on the grounds that the Court will not execute such a contract as the present, and that the Plaintiffs have an adequate remedy in damages. But the only cases in which the Court has refused to perform a contract for building or executing works are those in which damages at law will restore the injured party to his original position. That is here impossible. The Plaintiffs, in reliance on the Defendants' agreement, have come under a statutory obligation to make the line, by which the Defendants, as landowners, have profited, and the obligation is enforced by the suspension of dividends. For this suspension no damages could be recovered by the Plaintiffs, as it is not a damage to the Company but to the shareholders, who could bring no action. Besides, there are no insuperable difficulties in the way of executing this contract. The specification has been settled by the very engineer who filled that office in the Company when the contract was made. This, however, was not necessary, for suppose a contract were entered into to purchase land at a price to be named by A., and that A. should settle the conveyance, and A. had fixed the price, would not the agreement be enforced whether A. had settled the conveyance or not? If any difficulties of detail should arise, the Master's Abolition Act (15 & 16 Vict. c. 80, s. 42) enables the Court to overcome them by obtaining the assistance of
engineers,

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engineers or other scientific persons as there provided. At all events the Court will assist the Plaintiffs in obtaining their legal remedy by enforcing the execution of a bond which is a distinct stipulation.

They referred to *Mosely v. Virgin* (a); *The City of London v. Nash* (b); *Hall v. Warren* (c); *Lumley v. Wagner* (d); *Dietrichsen v. Cabburn* (e); *Avery v. Langford* (f); *Sedgwick on Damages* (g); *Gervais v. Edwards* (h).

The LORD JUSTICE KNIGHT BRUCE referred to *Street v. Rigby* (i); and *Gourlay v. The Duke of Somerset* (k).

Mr. *Daniel* and Mr. *Babington*, who appeared for one of the Respondents, and Mr. *W. M. James* and Mr. *Rogers* for the other, were not called upon.

The LORD JUSTICE KNIGHT BRUCE.

There are several very satisfactory reasons in my opinion disabling a Court of equity from enforcing a specific performance of a contract such as this of the 1st of August 1851. I will mention some, I do not say all, of those reasons. In the first place, by the agreement it is provided, in the most vague terms, that the Plaintiffs shall find the land—the land, I suppose, for the stations within a reasonable time, and build the stations; then the contractors are to give a bond for 50,000*l.* to secure the performance of the contract, and they are to undertake to execute the works for a double line of railway according

(a) 3 *Ves.* 184.

(b) 3 *Atk.* 512.

(c) 9 *Ves.* 605.

(d) 1 *De G., Mac. & G.* 604.

(e) 2 *Phil.* 52.

(f) 1 *Kay*, 663.

(g) *Pages* 38, 74.

(h) 2 *Dr. & War.* 80.

(i) 6 *Ves.* 815.

(k) 19 *Ves.* 429.

according to the terms of the specification to be prepared by the engineer for the time being of the Company for the sum of 290,000*l.* with interest. It is obvious that the engineer of one day may not be the engineer of the day following, and that, skilful, experienced and honourable as the engineer of the present day may be, the engineer of the Company who may have to prepare the specification may be incompetent and dishonest. In my opinion, it is not within the proper province of a Court of equity to enforce a contract of this description against any man or body of men. But then it has been said that a specification has been prepared by the gentleman who was at first and happens to be still the engineer of the Company, Mr. *Brunel*. That circumstance, I think, is nothing. Whether it would have made any difference if such a specification had not only been prepared, but had been approved and accepted by the Defendants, I need not, and do not say, because there is no such allegation in the bill, the only statement being that the contents of a particular letter are true, which letter merely states that the writer believed that the specification had been approved of.

It has been said, however, that at all events the Court may enforce specific performance, so far as regards the execution and delivery of a bond for 50,000*l.* to secure the performance of the contract. For this the authority of the case of *Lumley v. Wagner* (a) has been cited. Assuming, again, for the sake of the argument, that the agreement is intelligible, and acceding as I do to the authority of *Lumley v. Wagner* (a) and other cases of that description, I cannot accede to the propriety of their application to a case where the main part of an agreement is not fit to be specifically enforced in equity, and

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(a) 1 *De G., Mac. & G.* 604.

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and where it is sought to enforce the performance of a subsidiary part of it, and more especially where that subsidiary part is of such a nature as that which in the present case the Court is asked to be instrumental in enforcing. For the agreement thus provides, "The Company to work the branch in a reasonable and proper manner as compared to the remainder of the *South Wales* Railway, in case of difference as to working, the same to be settled by arbitration." What arbitration? When, where and by whom are the arbitrators to be appointed? or is there to be only one arbitrator? matters which may make a difference in the entire fortune and success of a man's life. But beyond all this, the agreement goes on to say, "Any of the details of this arrangement, in case of difference, to be determined by a referee to be appointed by the Solicitor-General for the time being on the application of either party, such referee to draw out and settle on behalf of both parties the documents necessary to carry it out." What this means some one may, I do not deny, be capable of understanding. One singularity of the provision is, that it seems to assume the Queen's Solicitor-General to be always at the service of the parties. It further provides thus: "The arbitrators under working clause to have power of considering whether the mode of working the *Pembroke* branch is reasonable, having reference to the Company's mode of working the branch to *Neyland*, and if the arbitrators make any award both parties to abide by it." Such is the agreement which this Court is asked to decree to be specifically performed, and, failing that, the Court is asked to compel the Defendants to execute a bond in a large sum to enable the Plaintiffs to enforce it at law, the bond being to compel the Defendants to submit matters to arbitration in the way that I have mentioned, and that, too, in the face of the principles laid down by Lord *Eldon* and Sir *William Grant*, in the well-known cases

to

to which I will now refer. In *Street v. Rigby* (a) Lord *Eldon* thus expresses himself with reference to a plea of an agreement to refer to arbitration. "The party must put himself in a situation to have substantial damages. In this case, upon an action, they could have only 1s., for they could not ascertain what more they were to have. Then, what can they have in equity? There is considerable weight, as evidence of what the law is, in the circumstance that no instance is to be found of a decree for specific performance of an agreement to name arbitrators; or that any discussion upon it has taken place in experience for the last twenty-five years. I was counsel in *Price v. Williams* (b), a case which justifies considerable doubts whether the eulogia upon the domestic forum of arbitrators are well founded. That was a case before Lord *Thurlow* upon a bill for specific performance of such an agreement, sending parties to arbitrators who might or might not be able to come to a decision; and Lord *Thurlow* was of opinion that the Court would not perform such an agreement." Sir *William Grant*, in the case of *Gourlay v. The Duke of Somerset* (c), is equally express. "I cannot find," he says, "any case in which an agreement to submit any matter to reference has been used in any other way than as an objection by the Defendant to the interference of the Court upon the subject matter of such agreement. There is no instance of a Plaintiff seeking the interposition of the Court, and obtaining it, who has been held entitled to have any part of his relief administered to him through the medium of a reference, compulsory on the other party. A bill seeking that, would be pro tanto a bill to enforce the specific performance of an agreement to refer to arbitration; a species of bill that has never been entertained."

I have

(a) 6 *Ves.* 818.

jun. 365.

(b) 3 *Bro. C. C.* 163; 1 *Ves.*

(c) 19 *Ves.* 429.

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I have never known a case like this since I have been acquainted with this Court, nor any attempt like it. The Plaintiffs may, if they will, take the case to a Court of law, but we cannot entertain a suit to enforce so vague, so obscure, so uncertain an agreement, or an appeal so frivolous and unfounded. The appeal will be of course dismissed, and equally of course be dismissed with costs.

The LORD JUSTICE TURNER.

I am of opinion that the Vice-Chancellor's decision must be affirmed. In cases of this nature the law provides a remedy in damages, and on that account the interference of a Court of equity is one in the exercise of its extraordinary jurisdiction,—is one of discretion,—and depends in all cases on the particular circumstances and facts of each case. Looking at the nature of this memorandum, I must say that I never saw a document less calculated to call forth the exercise of its jurisdiction to enforce specific performance. In the first place it is, as it is called in the memorandum itself, more in the nature of an arrangement than one of a final and concluded agreement, showing, as I am satisfied was the case, that the parties contemplated that there should be further provisions for rendering it final and conclusive. I do not say that this Court will not execute an agreement framed in general terms where the law will supply the details, but if those details are to be supplied in modes which cannot be adopted by the Court, there is then no concluded agreement which can be enforced in a Court of equity. Now what are the terms of this contract? [His Lordship read them.] Who is to say what is a reasonable time for finding the land, or in what mode the stations shall be fixed? And yet the finding of the land, and the fixing of the stations are of the essence of the contract. As soon as you come to act on the agreement, you find that there are matters to be left to further arrangement, and that the agreement

agreement is to be completed by reference to an arbitrator to be nominated by the Solicitor-General.

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The next clause is as to the bond. Laying no stress on the reasonableness of a reference to the engineer for the time being, I put this case. Suppose the engineer required a tunnel to be made through an impracticable rock, or from the nature of the soil not capable of construction without ruin to the contractors. The Defendants would be bound, nevertheless, by the specification. The other provision as to the working of the Railway is open to the same observation. I think, therefore, that the substance of this agreement cannot be carried into effect by the decree of this Court.

It has been argued that the case of *Lumley v. Wagner* (a), and cases of that kind afford some authority for such a bill. I think they afford no authority for it. In *Lumley v. Wagner* (a) the negative covenant was a distinct and substantive part of the agreement. But here the other parts are the whole substance of the contract, and the agreement to give the bond is a mere incident to the rest of the contract. That distinction takes the case out of the authority of *Lumley v. Wagner* (a) as to the bond, for if the Court refuses to enforce the performance of the principal contract, it will not decree the execution of that which is merely incidental to it. The case of *Avery v. Langford* (b) has been relied upon as an authority for enforcing a bond, but the contract there was enforced, and the bond as incidental to it. I entirely agree that this appeal must be dismissed with costs.

(a) 1 *De G., Mac. & G.* 604.

(b) *Kay*, 663.



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Upon a marriage, an undivided eighth share in remainder in fee, belonging to the wife expectant on a life estate in the entirety, was settled in trust for the wife for life, with remainder to the husband for life, with remainder to the children in tail, and remainder to the heirs of the

wife, and a power of sale and exchange was given to the trustees, who were to invest the proceeds in the purchase of realty in possession, and hold it on the trusts declared respecting the reversionary interest thus settled. The entirety of a portion of the estate was sold, in concurrence with the trustees of the settlement, by the other parties interested in the estate. By the purchase deed an eighth part of the purchase-money was apportioned according to the values of the life interest and the reversion in that share, and the value of the reversionary interest was expressed to have been paid to the trustees of the settlement. In point of fact, however, the whole eighth part was invested in consols, the dividends of which were paid to the tenant for life of the entirety. This state of things continued after the death of the wife (who died without leaving issue) during the lives of her husband and heir at law successively, but there was no evidence of their intention as to the destination of the fund beyond what was to be inferred from the above course of dealing with it:—

Held, that an election could not be inferred to take the property in its actual state, and that on the death of the heir at law his share of the fund was to be treated as part of his real estate.

Held, also, that it did not pass by his will under a devise of all such shares as he might at his death possess in the estate, there being a part of it remaining unsold to answer the description.

In the Matter of the Trusts of PEDDER'S SETTLEMENT, and of the 10 & 11 Vict. c. 96.

THIS was an appeal from a decision of Vice-Chancellor Wood on two petitions relating to a fund transferred into Court under the Trustee Relief Act.

By indentures of lease and release, dated the 19th and 20th of December 1824, and a recovery suffered in pursuance of a covenant contained in the indenture of release the manor of *Lambourne* deanery, and the rectory lands, tithes and other hereditaments therein described, were assured and limited as to one moiety to the use of *Hannah Clark*, and her heirs for ever, and as to the other moiety to the use of *John Withers Clark*, *Hannah Withers Clark*, *Mary Ann Clark* and *Eliza Clark*, their heirs and assigns for ever, equally to be divided between them as tenants in common.

By

By indentures of lease and release of the 30th and 31st of *May* 1828, being the settlement made on the marriage of *Robert Pedder* with *Eliza Clark*, all that the reversion in fee of *Eliza Clark*, expectant on the decease of *Hannah Clark*, of and in all that undivided one-eighth part, and all other the estate and interest of *Eliza Clark* of and in the aforesaid manor, rectory and hereditaments were assured to the use (after the marriage) of *Robert Pedder* for life, with remainder to the use of trustees to preserve contingent remainders, with remainder to the use of *Eliza Clark* for life, with remainder to the use of trustees to preserve contingent remainders, with remainder to the use of all and every or one or more of the children of the marriage as *Robert Pedder* and his wife should as therein mentioned appoint, and in default of appointment to the use of all the children equally as tenants in common, and the heirs of their respective bodies, with cross remainders between them, with remainder to the use of such person or persons who should be a descendant or descendants of either of the paternal or maternal grandfather or grandmother of *Eliza Clark*, and for such estate or interest as *Eliza Clark* should appoint, with remainder to the use of *Eliza Clark*, her heirs and assigns for ever. The release contained powers of sale and exchange thus expressed, " Provided also, and it is hereby further agreed and declared by and between the said parties to these presents, that it shall and may be lawful to and for the said *Maurice Hillier Goodman*, *John Charles Townsend* and *Sir Charles Price*, and the survivors and survivor of them, and the executors and administrators of such survivor, at the request and by and with the consent and approbation of the said *Robert Pedder* and *Eliza Clark* jointly during their joint lives, or of the survivor of them during his or her life, to be signified in writing under their, his or her hands and seals, or hand and seal, and after the death of the survivor

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vivor of them the said *Robert Pedder* and *Eliza Clark*, and during the minority of any child or children of the said intended marriage who, if of full age, are to be entitled to the said hereditaments and premises hereby granted and released, or any part thereof, then at the discretion of the said *Maurice Hillier Goodman*, *John Charles Townsend* and *Sir Charles Price*, or the survivors or survivor of them, or the executors or administrators of such survivor, to join and concur with the person or persons for the time being seised of or entitled to the other parts and shares of the manor, rectory, messuages, lands, tithes, hereditaments and premises one undivided eighth part or share of which is hereinbefore granted, released and confirmed, or expressed, or intended so to be, in making a partition or division of the said manor, rectory, messuages, lands, tithes, hereditaments and premises, or any part thereof; and also to sell and dispose of and to convey, either by way of absolute sale or in exchange for and in lieu of other hereditaments in fee simple in possession to be situate in some part of the kingdom of *England* or in the principality of *Wales*, the whole or any part or parts of the said undivided eighth part or share, and other the part, share, estate and interest of her the said *Eliza Clark* hereinbefore granted and released, or intended so to be, of and in the said manor, rectory, messuages, lands, tithes, hereditaments and premises, with their and every of their several and respective rights, members and appurtenants, and the inheritance thereof in fee simple to any person or persons whomsoever, for such price or prices in money, or for such equivalent or recompense in lands, tenements or other hereditaments as to them the said *Maurice Hillier Goodman*, *John Charles Townsend* and *Sir Charles Price*, or the survivors or survivor of them, or the executors or administrators of such survivor shall seem reasonable; and that for effectuating any such division or partition,
disposition

disposition or dispositions, conveyance or conveyances, it shall and may be lawful to and for the said *Maurice Hillier Goodman, John Charles Townsend* and Sir *Charles Price*, and the survivors and survivor of them, and the executors or administrators of such survivor, by any deed or deeds to be sealed and delivered by them or him in the presence of and attested by two or more credible witnesses absolutely to revoke, determine and make void all and every or any of the uses, trusts, powers and provisoes in and by these presents limited or declared of and concerning the hereditaments and premises which shall be so divided or partitioned, sold or agreed to be given in exchange as aforesaid, except the subsisting leases, if any such should then have been made, under and by virtue of the powers for that purpose hereinbefore contained, and by the same or any other deed or deeds to be sealed and delivered and attested as aforesaid, to limit, declare, direct and appoint any other use or uses, estate or estates, trust or trusts of the said hereditaments and premises so divided or partitioned, sold or agreed to be given in exchange which it shall be thought necessary or expedient to limit, declare, direct or appoint in order to effectuate such division or partition, sale or sales, exchange or exchanges, dispositions or conveyances as aforesaid, causing on every such exchange as aforesaid the hereditaments which shall be received or taken in exchange to be conveyed and settled to and for upon such and the same uses, trusts, intents and purposes, and with, under and subject to such of the same powers, provisoes, limitations and agreements as the hereditaments and premises so given in exchange stood limited to immediately before and at the time of such exchange or exchanges, and also that it shall and may be lawful to and for the said *Maurice Hillier Goodman, John Charles Townsend* and Sir *Charles Price*, and the survivors and survivor of them, or to or for the executors or administrators

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trators of such survivor, to receive or take any sum or sums of money by way of equality of partition or exchange. And it is hereby declared and agreed by and between the said parties to these presents, that when any part or parts of the said hereditaments and premises shall be sold for a valuable consideration in money, or when any sum or sums of money shall be received upon any such partition or partitions, exchange or exchanges as aforesaid for equality, they the said *Maurice Hillier Goodman, John Charles Townsend* and *Sir Charles Price*, and the survivors and the survivor of them, or the executors or administrators of such survivor, or other the trustees or trustee for the time being of these presents shall lay out and invest the monies arising by such sale or sales, or so received for equality as aforesaid, in the purchase of other hereditaments in fee simple in possession to be situate in that part of *Great Britain* called *England*, or in the principality of *Wales*, of a clear and indefeasible estate of inheritance, in fee simple, in possession, or in copyhold lands or tenements of inheritance in possession intermixed with hereditaments, so to be purchased as aforesaid, so as such copyhold lands or tenements do not exceed one-fourth part of the value of the hereditaments so to be purchased as aforesaid, and that they the said *Maurice Hillier Goodman, John Charles Townsend* and *Sir Charles Price*, and the survivors and survivor of them, or the executors or administrators of such survivor, or other the trustee or trustees for the time being shall settle and assure, or cause to be settled and assured the hereditaments so to be purchased, to such and the same uses, upon such and the same trusts, and with, under and subject to such of the same powers, provisoes, conditions and agreements as are in and by these presents limited, expressed and declared of and concerning the said hereditaments which shall be so sold, partitioned or given in exchange, and from which such monies arose, or

as near thereto as the deaths of parties and other intervening circumstances shall then permit of, and also that until the monies arising by such sales or sale as aforesaid, or to be received for equality as aforesaid, shall be disposed of in the manner hereinbefore mentioned, it shall and may be lawful for the said *Maurice Hillier Goodman, John Charles Townsend* and *Sir Charles Price*, and the survivors and survivor of them, and the executors or administrators of such survivor or other the trustee or trustees for the time being of these presents to place out such sum or sums of money at interest either in the Parliamentary stocks or public funds of *Great Britain*, or upon real security or securities in *England* or *Wales*, in the name or names of such trustee or trustees for the time being, and to alter, vary and transpose the stocks, funds and securities as occasion shall be and require; and it is hereby further agreed and declared by and between all the said parties to these presents that the interest, dividends and annual produce arising from such stocks, funds or securities shall go and be paid to such person or persons, or be applied to and for such ends, intents and purposes, and in such manner as the rents and profits of the hereditaments so to be purchased therewith as aforesaid would be, or be payable or applicable unto in case of such purchase or purchases and settlement were then actually made."

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Mr. and Mrs. *Pedder* both died without having exercised the powers of appointment vested in them or either of them, the latter having died on the 8th of *January* 1834, and the former on the 1st of *December* 1845, and there never was any child of the marriage. *John Withers Clark*, Mrs. *Pedder's* only brother, was her heir at law at the time of her death.

During the joint lives of Mr. and Mrs. *Pedder*, the
entirety

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entirety in possession of several parts of the manor of *Lambourne Deanery*, tithes, hereditaments and premises (of which the one-eighth part in reversion was comprised in the settlement) were from time to time sold on behalf and with the consent of *Hannah Clark*, and all other persons owners of the entirety, including Mr. and Mrs. *Pedder* and the trustees of their marriage settlement, who joined in the sales and conveyed to the purchasers the reversionary interest in the one-eighth share comprised in the settlement. Other portions of the entirety were sold after Mrs. *Pedder's* death, but in none of the sales was any specific sum ever mentioned or agreed on as the price of the one-eighth share in reversion comprised in Mrs. *Pedder's* settlement, except in the case of one purchase, made by a Mr. *John Richmond Seymour*, and the apportionment in that case was made under the following circumstances.

Having contracted to make his purchase of the entirety of a portion of the property for 6,295*l.*, Mr. *Seymour* refused to complete on the ground that the trustees of Mrs. *Pedder's* settlement had no power to sell the reversion in one-eighth by joining and concurring with the other parties entitled to the remaining shares, and the tenant for life, in a contract for sale of the entirety. In consequence of his refusal to complete, a bill was filed against him by Mr. and Mrs. *Pedder*, the trustees of their settlement, the tenant for life of the entirety, and the several other persons who were entitled in reversion to the one-eighth parts, for a specific performance. By the decree made on the hearing of that cause on the 15th of *July* 1834, the purchaser was decreed specifically to perform the agreement, but it was referred to the Master to apportion the purchase money. The Master found the value of the life interest in a moiety of the purchase money to be 729*l.*, and apportioned 2,418*l.* 10*s.* (the residue of the moiety)

moiety) among the several persons entitled thereto, assigning, consequently, 604*l.* 12*s.* 6*d.* in respect of each one-fourth part of the moiety. One of these shares he apportioned to *John Williams Clark*, another to *Hannah Withers Clark*, a third to the trustees of a settlement made on the marriage of *Mary Ann Clark* with *Rowland Mainwaring* (by which settlement her one-eighth share in the reversion was conveyed on similar trusts to those of *Mrs. Pedder's* settlement), and the remaining share to the trustees of the settlement of *Mr. and Mrs. Pedder (a)*.

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A subsequent purchase having been made by *Mr. Seymour* of other parts of the property, all the portions purchased by him were conveyed by a deed dated the 6th of *May* 1836, and made between *Hannah Clark* of the first part, *John Withers Clark* of the second part, *Hannah Withers Clark* of the third part, the trustees of *Mrs. Mainwaring's* settlement of the fourth part, *Mr. Mainwaring* of the fifth part, the trustees of *Mrs. Pedder's* settlement of the sixth part, *Mr. Pedder* of the seventh part, the purchaser of the eighth part, and a trustee for him of the ninth part. By this deed it was witnessed that in consideration of the several sums therein expressed to be paid by the purchaser to the several parties of the first, second, third, fourth and sixth parts, in the proportions in which the Master had apportioned the original purchase money, the entirety of the hereditaments and premises purchased by *Mr. Seymour* were conveyed to him by all the parties interested therein according to their several and respective estates, rights and interests.

These apportioned sums were not, however, in fact, paid as expressed in the conveyance, for, instead of the sums apportioned as the value of the reversionary interest  
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(a) See *Clark v. Seymour*, 7 *Sim.* 67.

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comprised in *Mrs. Pedder's* settlement being paid to the trustees of that deed upon the trusts of it, and the sum apportioned as the value of *Mrs. Hannah Clark's* life interest being paid to her, an eighth part of the total amount of the purchase monies was invested in the joint names of the trustees of *Mrs. Pedder's* settlement in Bank 3*l.* 10*s.* per Cent. Annuities. The trustees continued to pay the dividends of this sum to *Mrs. Hannah Clark* during her life, and the same proceeding was adopted with respect to the other shares, (being the course which had been previously taken with respect to all the other purchase monies of which no apportionment had been made), the whole amount of those several sums having been divided into eight parts, and one-eighth part having been invested in the names of the trustees of *Mrs. Pedder's* settlement in Bank 3*l.* 10*s.* per Cent. Annuities, the dividends of which were paid to *Mrs. Hannah Clark* to the time of her death.

No evidence could be obtained as to the terms of any arrangement or agreement under which this course was taken, all the parties being now dead.

*John Withers Clark* (*Mrs. Pedder's* heir at law) died on the 28th of *December* 1846, having made his will. At the date of his will, and thenceforth to his death, some parts of the entirety remained unsold, and he was consequently seised or possessed of the reversion in fee in an undivided share of those unsold parts; but, with the exception of such share, and an estate at a place called *Preshute*, he was not at the date of his will seised of or entitled to, nor had he any power to dispose of or appoint by will any real estate whatsoever. His heirs at law were his sister *Hannah Withers Clark*, and his niece *Mary Ann Mainwaring*, the only child of his sister *Mary Ann Mainwaring*.

By

By his will, which was dated the 24th of *September* 1846, after making a pecuniary specific bequest, he gave, devised, appointed and bequeathed all his freehold, copyhold and leasehold messuages, lands, tenements and hereditaments, and all his money and securities for money, farming stock and personal estate and effects of every description not thereinbefore disposed of unto and to the use of his friends *Thomas Baverstock Merriman* and *William Clark Merriman*, their heirs, executors, administrators and assigns, as to his said messuages, lands, tenements and hereditaments, in trust for his wife during her life, and as to his money, securities for money, and all other his personal estate and effects, except leaseholds upon trust, after payment of debts, funeral and testamentary expenses, and the pecuniary legacy for investment, and payment of the income to the testator's wife for life, and for payment after her decease out of the residuary personal estate certain pecuniary legacies. And after devising his estate at *Preshute*, he directed that his trustees or trustee for the time being should stand and be seised and possessed of all such part or share, parts or shares, estate and interest in possession, reversion, remainder or expectancy as he the testator might have power to dispose of or appoint by his will of and in all that manor of *Lambourne* Deanery in the county of *Berks*, and all and singular the rents, tithes, messuages, farms, lands, tenements and hereditaments of or belonging to the said manor, or situate in the manor of *Lambourne*, in the county of *Berks*, to the use of *Thomas Baverstock Merriman* and *William Clark Merriman*, their heirs, executors, administrators and assigns, in equal shares as tenants in common for their respective use and benefit. After making another specific bequest, the testator gave, after the decease of his wife, all his residuary personal estate, subject to the payment of the aforesaid legacies unto *Thomas Baverstock Merriman* and *William Clark Merriman*

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*Merriman* in equal shares for their respective use and benefit; and he appointed *Thomas Baverstock Merriman* and *William Clark Merriman* executors.

*Mrs. Hannah Clark* died on the 21st of *June* 1847.

On the 12th of *July* 1850, the surviving trustee of *Mrs. Pedder's* settlement transferred and paid into Court, under the Trustee Relief Act, 6,269*l.* 16*s.* 11*d.*, 3*l.* 5*s.* per Cent. Annuities, and 279*l.* 9*s.* 10*d.* cash, being the dividends which had accrued due on the said annuities since the decease of *Hannah Clark*, and soon after such payments and transfer the surviving trustee died.

*Hannah Withers Clark* and *Mary Ann Mainwaring*, as coheirs at law of *John Withers Clark*, presented the original petition in this matter, praying that it might be declared that, subject to the life interest therein of *Mrs. Maurice*, the tenant for life under *John Withers Clark's* will, the Petitioners, as coheiresses at law of *John Withers Clark*, were absolutely entitled to the fund in Court as real estate of *John Withers Clark*, undisposed of by his will, and that the fund might be carried over to an account entitled, "The account of *Hannah Withers Clark* and *Mary Ann Mainwaring*, coheiresses at law of *John Withers Clark*, deceased, subject to the life interest of *Rebecca Maurice*."

A cross petition was presented by *Thomas Baverstock Merriman* and *William Clark Merriman* claiming the fund, subject to the life interest, as executors and residuary legatees of *John Withers Clark*, as part of his personal estate.

On the 29th of *May* 1851 an order was made by Vice-Chancellor *Turner* on both petitions directing preliminary inquiries.

The

The Master, by his report, dated the 23rd of *December* 1853, found the facts above stated. He further found that arrangements were made on the occasions of the sales to the effect that the dividends of the investment arising from the one-eighth share in question of the purchase monies should be paid to *Hannah Clark* for life, and after her death to Mr. *Pedder* for life, and that the principal should be held after Mr. *Pedder's* death in trust for *John Withers Clark*.

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The matter came on again before Vice-Chancellor *Wood* on two petitions, one of the coheiresses of *John Withers Clark*, in the nature of exceptions to the report, and the other by Messrs. *Merriman*, praying that the report might be confirmed, and for consequential directions.

The Vice-Chancellor said, that the evidence as to any agreement or arrangement did not, in his Honor's opinion, carry the matter further than the facts as they existed, that evidence not stating time or place, or circumstances of the alleged agreement in any way. Upon the facts his Honor did not think the matter clear. The whole eighth share had come into the hands of the trustees of the settlement, and, if the matter had rested there, as it did before the suit against Mr. *Seymour*, his Honor would have had little difficulty in holding that these monies were impressed throughout with the trusts of the settlement; but his Honor thought that from the institution of that suit all concerned must be taken to have been cognizant of their rights. The result of the arrangement or agreement between the parties, (whatever it was), was, that the whole monies remained in the hands of the trustees of the settlement, who continued, as a matter of fact, to pay the income of the whole of the fund to Mrs. *Clark* for her life. Mr. *Pedder* died, having received

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no portion of the income of that part which represented the reversion, which he would have received according to his rights, unless there had been some arrangement between the parties. After the death of Mr. *Pedder*, which occurred some time before that of Mr. *John Withers Clark*, Mr. *John Withers Clark* still allowed Mrs. *Hannah Clark* to receive the whole income of the fund, he being at that time entitled to the dividends of such portion of the money as represented the reversionary interest. What, then, must be inferred to have been the agreement? It was not likely to have been that the portion which represented the reversionary interest should be considered as being impressed with the trusts of settlement, while the other part was not. It must have been one of these two arrangements:—either that which the coheiresses of Mr. *Clark* averred in their state of facts, namely, an agreement that the whole eighth part of the entirety of the purchase monies, instead of being apportioned between *Hannah Clark* and the trustees of the settlement, should be enjoyed by *Hannah Clark* during her life, and should be after her decease subject to the trusts declared by the settlement of the eighth part in reversion;—or that which was contended for by the personal representative, namely, an agreement, on the one hand, that the whole fund should be held in trust for *Hannah Clark* for life, and then for the person next entitled under the trusts of the settlement, according to the declaration of trust in the settlement, but not impressed with the character and with all the trusts which were impressed upon the money as it stood limited by the settlement. In order to decide according to the former of these contentions, the Court must come to the conclusion that *Hannah Clark* had agreed that the whole eighth share of the money should be subject to all the trusts of the settlement; in other words, that the money should be held according to the trusts for investment

investment in land on the first opportunity that presented itself, and wholly without regard to the rights of *Hannah Clark*. To enable the Court, however, to arrive at such a conclusion, there must be more positive evidence than there was here, as it would make a material difference to *Hannah Clark* if this money, irrespectively of any control on her part, were liable to be reinvested in land by the trustees who were not her trustees. And if the Court could not make that presumption, there would be as great difficulty in presuming that *Hannah Clark* agreed, or that it was an agreement between all the parties, that *Hannah Clark* should take the dividends during her life, and that afterwards the fund should be reinvested in land. That would be making an agreement for the parties which his Honor did not think there was sufficient ground for presuming. The conclusion that *Hannah Clark* had dedicated her money to an investment in land required stronger proof than was necessary to establish the election of a party who was entitled to a fund either as money or land to take it in its actual state. As regarded such an election, it was true, as had been argued, that the evidence of an intention to reconvert, though it might be slight, must be unequivocal; but it appeared to his Honor an unequivocal act on the part of Mr. *Clark* to suffer *Hannah Clark* to continue to receive the whole dividends. With regard to Mr. *Clark's* will, his Honor did not regard it as affording any evidence of intention one way or the other.

By the order under appeal, it was declared that the 6,269*l.* 16*s.* 11*d.*, Bank 3*l.* 5*s.* per Cent. Annuities, standing in the name of the Accountant-General in trust in the above matter, formed part of the personal estate of *John Withers Clark*, and that, subject to the life interest therein of *Rebecca Maurice*, in the petitions named, the

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Petitioners *Thomas Baverstock Merriman* and *William Clark Merriman*, as the executors of the will of *John Withers Clark*, deceased, were entitled under the said will to the said 6,269*l.* 16*s.* 11*d.*, 3*l.* 5*s.* per Cent. Annuities.

From this order the coheiresses appealed.

Mr. *Rolt* and Mr. *Osborne*, for the Appellants.

The principal ground of the Vice-Chancellor's decision was, that Mr. *Seymour's* purchase deed described a state of investment in accordance with the settlement, but that all the parties interested in the fund concurred in a different mode of enjoying it, and that from these circumstances the trusts must be presumed to have been changed into entirely new ones, among which there was nothing to show that one for investment in real estate was comprehended, and that in the circumstances of the case such a trust could not be presumed in the absence of evidence. We submit that this reasoning is fallacious, and that no intention ought to be presumed to change the trust further than it was actually changed, or consequently to destroy the original trust for conversion. To do this an intention to reconvert must be shown. [*The LORD JUSTICE KNIGHT BRUCE* referred to *Stead v. Newdigate*(*a*) and *Ashby v. Palmer*(*b*).] It is necessary to show affirmatively that the heir at law had an intention to reconvert. A small act may be sufficient to denote such an intention, but the intention must be unequivocally shown. An act during a tenancy for life is not sufficient to determine the intention as to the reversionary interest. The dealings here took place under a mistake, and denote no intention whatever with reference to the actual rights of the parties.

They

(*a*) 2 *Mer.* 521.

(*b*) 1 *Mer.* 296.

They referred to and commented on *Wheldale v. Partridge* (a), *Pulteney v. Lord Darlington* (b), and *Powell on Devises by Jarman* (c).

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Mr. *W. M. James* and Mr. *Speed*, for Messrs. *Meriman*.

The testator, *John Withers Clark*, must have regarded the fund as personalty, first, because the trust in the settlement for investment does not apply to the invested fund, which is made up of the value of the life estate of *Hannah Clark*, and the value of the settled reversion. Nor is there any trust in the settlement applicable to this new fund, with respect to which we are left to ascertain the trusts from the conduct of the parties. We must infer from that conduct an intention to depart from the trusts of the settlement, for the course of dealing in which they all concurred was inconsistent with those trusts. Their conduct also shows clearly what the new trusts were on which they intended the property should be held, but there is nothing whatever to show that those new trusts were for a conversion of the money into land; and there is no presumption to that effect. On the contrary, even where there is a subsisting trust for conversion (as we submit there was not here) slight circumstances are sufficient to show an intention to take the property in its actual state; *Pulteney v. The Earl of Darlington* (d); *Van v. Barnett* (e); *Lingen v. Sowray* (f); *Davies v. Ashford* (g).

Even if the trusts had not thus been changed by the acts of all the parties interested, still as the interest in the portion of fund subject to Mrs. *Pedder's* settlement, which

(a) 8 *Ves.* 227.

(b) 7 *Bro. P. C.* 530.

(c) Vol. 2, p. 64.

(d) 7 *Bro. P. C.* 530.

(e) 19 *Ves.* 102.

(f) 1 *P. Wms.* 172.

(g) 15 *Sim.* 42.

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which resulted to the heir, was part of a fund impressed with the character of personalty, he took the share as regarded those claiming under him in that character; *Smith v. Claxton* (a); *Wright v. Wright* (b); *Hewitt v. Wright* (c).

They also referred to *Bradish v. Gee* (d); *Crabtree v. Bramble* (e).

Lastly, if this is realty, it must pass under the devise to the Respondents in Mr. *Clark's* will.

Mr. *Simpson*, for the trustees.

Mr. *Rolt* replied, and on the question of construction of Mr. *Clark's* will referred to *Hougham v. Sandys* (f).

THE LORD JUSTICE KNIGHT BRUCE.

It is rather a compliment to myself than to Sir *William Wood* to say that I seldom differ from him, but in the present instance I do not arrive at his conclusion. It seems impossible for the Respondents to avoid contending that if Mr. *Pedder* and Mr. *John Withers Clark* had been now alive, the capital of the fund in dispute could not have been invested in the purchase of land without the consent of the latter. My opinion, however, is otherwise; for, as the evidence strikes me, the intention and agreement of Mrs. *Clark* and her son in law and son, respecting the sales in question and their produce, were in substance and effect that they should be treated and dealt with as if Mrs. *Clark* had been a party to the settlement of 1828, and there had been settled and made saleable

(a) 4 *Madd.* 484.

(b) 16 *Ves.* 188.

(c) 1 *Bro. C. C.* 86.

(d) *Amb.* 229.

(e) 3 *Atk.* 680.

(f) 2 *Sim.* 95.

able by it the entire freehold and inheritance of Mrs. *Pedder's* eighth part of the *Lambourne* estate, that is, the life estate of Mrs. *Clark*, as well as the fee, with the reservation to her of a life interest in the eighth part and in its purchase money. I do not find ground for holding that to any other extent, or in any other sense or manner, Mr. *Pedder* or Mr. *John Withers Clark* meant to alter or affect any right or interest of either.

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Parts of the entirety of the *Lambourne* estate having remained unsold at Mr. *John Withers Clark's* decease, it does not seem to me that his will affected the beneficial interest in this fund beyond his widow's life, and my judgment upon the present controversy is accordingly in favour of his heir at law, who is also, as I collect, the heir of Mrs. *Pedder*; and I think that Messrs. *Merriman* should pay the costs occasioned by their opposition to that title.

*The* LORD JUSTICE TURNER.

I may truly say that I never dissent from Vice-Chancellor *Wood* without very much distrusting my own judgment. If, therefore, I had not had an opportunity of considering the case after the conclusion of the argument yesterday, I should have taken time for that purpose. The circumstances of the case are somewhat peculiar. [His Lordship stated them.] On sales of different parts of the entire property being made in the lifetime of Mrs. *Pedder*, the proceeds were invested in Consols, and, as to one-eighth of the proceeds, in the names of the trustees of Mrs. *Pedder's* settlement. Other arrangements were made as to other parts, but each eighth part was kept distinct. At this time there could not be any intention to alter the trusts imposed by the settlement of 1828, because there might then have been children, and the trustees were not in a position to alter the nature of the property.

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Neither could it have been done as to Mrs. *Mainwaring's* share. There cannot, therefore, be presumed to have been an intention to alter the nature of the property from the fact of the sales.

What, then, is the legitimate inference to be drawn from the sale and the investment of the purchase money in the names of the trustees? Surely this, that the parties intended the life interest to remain in the mother of Mrs. *Pedder*, and the whole corpus to be subject to the trusts of the settlement in the place of the reversionary interest. The Vice-Chancellor seems to have thought that this must have been presumed to have been the intention if the matter had rested there. But in 1834 a purchaser of part of the property raised the question whether the powers in the settlement authorized a sale of the property in reversion. A bill for specific performance was filed against him in this Court, and the Court was of opinion that the trustees had such power, but that there must be an apportionment of the purchase money; a decree was made referring it to the Master to ascertain the values of the life estate and the reversion; and conveyances were executed purporting to proceed on the apportioned values of the life interest and the reversion; the mother being represented as receiving the value of the life interest, and the trustees that of the reversion. That arrangement, however, was not carried into effect, but instead of it, the property was enjoyed as it was originally settled, and the whole amount of one-eighth of the purchase money remained in the hands of the trustees. In the interim, Mrs. *Pedder* died without having exercised her power of appointment, and the only remaining interests in the one-eighth were the life estates of Mrs. *Clark*, Mr. *Pedder* and Mrs. *Pedder's* heir.

Now, what was the consequence of the arrangement
 having

having been entered into by which the fund, instead of being apportioned, was to be retained in the aggregate as it existed? The Vice-Chancellor seems to have thought that, in this state of circumstances, he was driven to the conclusion that there was an agreement to alter the nature of the property, and to treat it as money. I think it not necessary to draw that conclusion. The inference which I draw is, that it was intended to retain the property in the same state as it was in before the suit against the purchaser was commenced, and that, the difficulty of dealing with the property (arising from the possibility of issue) being removed by the death of Mrs. *Pedder*, the parties reverted to their former situation, and that the fund was intended to be held on the trusts of the original settlement. I think that a more natural inference than the Vice-Chancellor's. It is said that the mode of dealing with the fund altered the rights of the parties under the settlement, and so it did, but how? Why thus, that whereas Mr. *Pedder* would have been entitled in possession to the apportioned fund, he gave up the immediate possession of a life interest, and took an interest in a larger fund in reversion. Being driven to draw some conclusion, we find ourselves unable to draw the conclusion at which the Vice-Chancellor has arrived. I think that there was no intention to alter the nature of the fund.

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The next question is, whether the will of *John Withers Clark* affected the fund beyond the life of his widow. I think that it did not. If authority were wanted, *Hougham v. Sandys* (a) is conclusive. This is not so strong a case; for the subject of the devise is the *Lambourne* estate, and there is property to answer the description without referring it to this fund, to which it is not properly applicable.

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(a) 2 *Sim.* 95.

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It has been argued that although the proceeds of the sale went to the heir, yet he took them as personalty, and authorities have been cited on that subject. But the trust in this case is to lay out the whole settled share of money in the purchase of real estate, and if the wife had been alive it must have been so laid out. I think that the cases cited in this part of the argument have no application.



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Affidavits may be still sworn before notaries public in foreign countries, (having authority there to administer oaths) according to the old practice, which is not altered in this respect by 15 & 16 Vict. c. 86, s. 22.

MR. *NALDER* applied to their Lordships for a direction that the Clerk of Records and Writs might place on the file an affidavit, sworn before Mr. *Allen*, a notary public at *Geneva*, in the county of *Ontario*, in the State of *New York*, in *America*. The fact of Mr. *Allen* being a notary public, and that credit ought to be given to his official acts, was certified by the British Consul at *New York*, under the official seal. The Clerk of Records and Writs doubted whether the jurat was sufficient. There was an affidavit of the solicitor in the cause, stating that he had applied to General *Campbell*, the American Consul in *England*, who informed him that notaries public in the United States were authorized by law to administer oaths in any law proceedings in that country.

The application had been made, in the first instance, to Vice-Chancellor *Kindersley*, who, on being referred to the 22nd section of the Chancery Amendment Act (15 & 16 Vict. c. 86), considered that the case was not within that section.

Their LORDSHIPS (after consulting Mr. *Walker*, the Registrar,

Registrar,) said that the affidavit would have been sufficient before the passing of the new Act, and that, as there appeared to be nothing in the Act to exclude it, it ought, in their Lordships' opinion, to be placed on the file.

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EVANS v. COVENTRY.

THIS was an appeal from the decision of Vice-Chancellor *Kindersley*, refusing a motion of the Plaintiffs' for an injunction and receiver. The case is reported in the 3rd Volume of Mr. *Drewry's* Reports (a). For the purposes of the present Report, the following statement will be found sufficient.

The bill was filed by the Plaintiffs, on behalf of themselves and all other the members insured in certain societies called "The General Benefit Health and Life Assurance Society" and "The City of *London* Loan Society and Deposit Bank," except such of them as were Defendants, against the trustees, treasurer and manager of those societies.

The bill stated, in substance, that the assurance society was established in 1820, for the purpose of insuring lives and granting weekly allowances during sickness; that it had a nominal capital of 50,000*l.*, in shares of 1*l.* each. That the loan and deposit bank consisted of the same trustees, treasurer, manager, directors and officers,

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the insurance money) on behalf of himself and other persons so insured, charging a loss of the fund through the negligence of the directors, and on the affidavits showing that the secretary had absconded with part of the funds, and that some of the directors were in needy circumstances—*Held*, that the Plaintiff was entitled to the appointment of a receiver and to an injunction.

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Where a portion of a trust fund has been lost, that is *prima facie* a breach of trust, and a sufficient ground for the appointment of a receiver on an interlocutory application:—*Held*, also, that objections to the bill on the ground of misjoinder, multifariousness or want of parties, were no answer to such an application.

On a bill filed by a Plaintiff insured in a society (whose funds were liable to pay

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as the insurance society, and was, in fact, a branch of it. That the funds of the societies were carried to the same account at the bankers, and invested in the names of the same trustees; and that the accounts of the one could not be taken without those of the other. That one of the Plaintiffs effected an insurance for 4s. per week, and another Plaintiff for 3s. per week, during sickness, and had paid the premiums regularly; that another Plaintiff deposited with the loan society 26*l.*, which was due to him, with interest. That others of the Plaintiffs had effected insurances on their lives in the assurance society, and had paid the premiums; that another Plaintiff was the personal representative of a deceased member, on whose death a sum of 25*l.* became due on a policy effected by her. That, on application by him (the last-mentioned Plaintiff) to the directors for payment of the 25*l.*, an answer was sent, stating that the secretary had left the office in considerable embarrassment, and that an investigation was in progress, the result of which would be laid before the claimants, and their directions taken as to the best mode of winding up the society. That the office of the societies was closed, and the business of the societies had ceased to be carried on; and that the directors had refused to repay the Plaintiffs their deposits or insurance monies.

The bill prayed that an account might be taken of the funds and property belonging to the societies, and of the application thereof; that the Defendants might be declared personally liable for any loss which had accrued to the funds of the societies, or either of them, by reason of the default of the Defendants, or any of them, and particularly of the secretary; that, if the funds of the society then forthcoming, exclusively of what the Defendants were liable to pay on account of the default of the secretary, were insufficient to meet and satisfy the claims

claims on the societies, the Defendants might be declared liable to make good the same to the extent of 50,000*l.*, guaranteed by them by a prospectus mentioned in the bill; that the accounts of the societies might be investigated, and, if necessary, the affairs of them wound up; that, in the meantime, the conduct and management of the societies might be taken under the protection of the Court, and that a proper person might be appointed manager and receiver, to get in the outstanding assets; and that the Defendants might be restrained from parting with the funds in their possession or control, and from recovering any outstanding estate.

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By their answers, the Defendants stated that the loan society was established in 1838, and was carried on at the same office as the assurance society, but that the two were never amalgamated; that they had the same directors and the same secretary; that the secretary had falsified the accounts of both, and had absconded to *Australia*, having appropriated to his own use considerable sums belonging to both societies; that, upon a discovery of the defalcations, the office of the societies was closed for the purpose of investigation; that the monies of both societies had been paid by the secretary into the Bank of *England*, and had not been distinguished; that, under the circumstances aforesaid, the directors had refused to make payments in respect of the insurances. They objected that the interests of the proprietors of the insurance society were altogether distinct from those of members of the loan company; that the interests of the creditors by insurance were conflicting with those of the proprietors; and that the bill was multifarious.

In support of the motion for a receiver, affidavits were filed, verifying the statements in the bill, and also an affidavit of the clerk to the Plaintiffs' solicitor, stating  
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that one of the directors of the societies, and of the Defendants, resided in a very small house, and appeared to be in needy circumstances; that another of them, who also appeared to be in needy circumstances, said, on being served with the notice of motion, that it was of no use suing him, as he was merely a furniture broker and had not 50*l.* in the world; and further said, that another of the directors was only a warehouseman, and had little if any property, and that it would be of no use taking proceedings against any of them, adding also that the directors had proposed to sell out part of the stock belonging to the societies, for payment of the expenses of the suit, but that their solicitor had advised them not to do so. Another witness deposed to another director having stated that he was in needy circumstances.

By the policies of the assurance company it was provided that the capital stock or funds of the company, for the time being, remaining unapplied and undisposed of, in pursuance of the trusts, powers and authorities contained in the deed of settlement of the company, should alone be answerable to the demands of the assured, or the heirs, executors, administrators or assigns of the assured, under the policies; and that the members of the company should not, nor should any of them, be answerable, directly or indirectly, further or otherwise than as to their respective shares in the sum of 50,000*l.*, constituting the original capital stock or funds of the company, set opposite to their respective signatures to the deed of settlement.

The deed of settlement contained a similar provision. It also provided that the funds of the company should consist of the capital of 50,000*l.*, and of all sums to be received by the society for assurances; and that, at the end

end of seven years from the date of the deed, and afterwards, at specified intervals, bonuses might be declared.

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The rules of the company provided that, on payment of the premiums, the assured, after receiving a "free receipt," would be considered a member of the society so long as he observed its rules.

The motion for an injunction and receiver was, in the first instance, made before any answer was filed, and was ordered by the Vice-Chancellor to stand over till the Defendants had put in their answer. On it being then renewed, the Vice-Chancellor refused it on the grounds that, as the suit was constituted, he did not see how the Court could ever make a decree for the distribution of the funds;—that the suit was one by persons in the position of creditors of a joint-stock company, and that the Plaintiffs, and some of those whom they took on themselves to represent, had directly conflicting interests; that there was no imputation of want of integrity on any of the Defendants except the secretary, nor any imputation of insolvency, except by showing that they were persons of very limited circumstances (*a*).

From this decision the Plaintiffs appealed.

Mr. *Anderson* and Mr. *G. W. Collins*, in support of the appeal.

Mr. *Elderton* and Mr. *Selwyn*, for different Respondents.

The following cases were referred to, *Sibson v. Edgworth*;

(*a*) See 3 *Drewry*, p. 78 *et seq.*



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worth (a); *King v. Malcott* (b); *Hudson v. Maddison* (c); *Maclaren v. Stainton* (d); *Clough v. Ratcliffe* (e); *Beaumont v. Meredith* (f); *Richardson v. Larpent* (g); *Richardson v. Hastings* (h); *Minn v. Stant* (i); *Hallett v. Dowdall* (k); *Underwood's Case* (l); *Pearce v. Piper* (m); *Clements v. Bowes* (n).

Mr. Anderson, in reply.

*The LORD JUSTICE KNIGHT BRUCE.*

The arguments which have been advanced in opposition to this motion might have had place or even weight if the application were of a different nature, or made at a different stage of the cause. But this is not the hearing of the cause; there is no plea; there is no demurrer. The application before the Court is simply an interlocutory application for an injunction, accompanied by the appointment of a receiver, without which the injunction (if otherwise proper) would be unsafe, and perhaps unreasonable. The application for the appointment of a receiver is here in a sense included in the injunction sought, as an order for injunction is always more or less included in an order for a receiver.

The application before the Court is founded on the common right of persons who are interested in property which is in danger to apply for its protection. Upon the bill and answer it appears that the Plaintiffs are interested in the funds of that which was an association, under whatsoever circumstances of honesty or dishonesty, constituted

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|-------------------------------------|--------------------------------------|
| (a) 2 <i>De G. &amp; Sm.</i> 73.    | (h) 11 <i>Beav.</i> 17.              |
| (b) 9 <i>Hare</i> , 692.            | (i) 15 <i>Beav.</i> 49.              |
| (c) 12 <i>Sim.</i> 416.             | (k) 16 <i>Jur.</i> 462.              |
| (d) 16 <i>Beav.</i> 279.            | (l) 5 <i>De G., M. &amp; G.</i> 677. |
| (e) 1 <i>De G. &amp; Sm.</i> 164.   | (m) 17 <i>Ves.</i> 1.                |
| (f) 3 <i>Ves. &amp; B.</i> 180.     | (n) 1 <i>Drew.</i> 684.              |
| (g) 2 <i>Y. &amp; C. C. C.</i> 507. |                                      |

stituted or carried on, but the affairs of which have ceased to be, and probably can never again be, in a state of activity. It was intimately connected with another society, or alleged society, of a subsidiary nature.

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The Defendants are persons, or include persons, who owed duties to those represented by the Plaintiffs in respect of the funds of the society, for the purpose of care and protection. Those duties appear to have been abandoned in a manner deserving, as it would at present appear, the strongest observation. This has led to a grievous loss, which has been sustained by persons of small means and in humble circumstances, who are ill able to bear it. These same Defendants have now under their control, or in their power, a poor remnant of the property which they have so ill cared for. Whatever may be the specific allegations, or want of specific allegation, in the bill, the true and necessary result of the entire pleadings as they stand is, that this remnant of property is in danger.

In my judgment, the objections which have been urged against this application, at the existing stage of the cause, might be urged with as much reason, as much force, and as much effect, if this were an application to restrain the felling of timber or the destruction of a house. It is a case of waste, partly perpetrated and obviously imminent. But for the judgment which has been given, and for which I feel the most unaffected respect, I should have said, from my experience of the practice of the Court in Lord *Eldon's* time, that this was a plain case for that injunction, and that receiver, which I think ought now to be granted.

*The* LORD JUSTICE TURNER.

Whatever else may be said of this motion, it cannot be  
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said that any argument has been omitted which could be urged against it. What the Court has to look at is the position of the parties on the record. According to the allegation of the bill, verified by affidavit or admitted by the answer, the Plaintiffs are in the position of parties who have a charge on the funds of what I may for the present purpose call the original association. The Defendants are in the position of trustees of the association. It appears that funds of that association have been lost by the act of the treasurer, whose conduct it was the duty of the other Defendants to superintend.

Primâ facie, therefore, there appears a clear case for the interference of the Court; for I certainly cannot accede to Mr. *Selwyn's* argument, that a breach of trust is not a sufficient ground for the interference of the Court by the appointment of a receiver. Whether the Plaintiffs will ultimately establish the commission of a breach of trust is not the question now before the Court. It is admitted that funds have been lost, of which it was the duty of the Defendants to take care. That loss is primâ facie evidence of a breach of the duty of the Defendants, sufficient to authorize the interference of the Court by the appointment of a receiver.

It is said, however, that the bill is multifarious. That objection is no answer to the motion. It is also said that the bill is liable to objection on the ground of misjoinder, some of the Plaintiffs having interests adverse to those of others of them. But for what purpose was the Chancery Amendment Act passed? Was not one of its purposes to enable the Court to deal with cases according to justice, notwithstanding any formal objections on the ground of multifariousness?

It is further objected, that there are here two societies,  
a loan

a loan society and an insurance society; and it is said, that by appointing a receiver the Court will greatly prejudice the interests of the depositors in the loan society. The argument deserves attention, but is it the result of the statements on the record and the evidence that there are two societies? According to the view which I take of the evidence, I think there is the strongest reason for supposing the truth to be that the insurance society dealt with their funds by way of loan, and afterwards constituted a loan society, using it as a branch of the insurance society. One circumstance from which that may be inferred is the description of the insurance society in its documents and papers before the existence of the loan society as "The General Benefit Health and Life Insurance Society and Loan Society."

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It is said that the record is not perfect as to particulars, and undoubtedly it is not in the shape in which the Court may find it necessary that it should be ultimately placed in order to administer complete justice, but I do not apprehend this to be a sufficient answer to an application for the appointment of a receiver. If the Court sees that there is a case upon the record for the appointment of a receiver, and that any formal objection may be removed by amendment, it will not stay its hands on account of any such objection.

Another objection which has been urged is, that the Plaintiffs are not members of the society, and yet come here for the administration of its funds. But how does the case stand in this respect? The Plaintiffs are assured in the society, and are in the rules and in the proposals described as members. But whether they are members or not, they are insured, and they sue on behalf both of members and of persons insured; and if there is a mistake

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in their description, such an error does not constitute a sufficient objection to the motion.

It is further objected, that the bill seeks to have the concern wound up, and that for this purpose all the members must be before the Court. I say nothing as to that objection, for the bill asserts an equity upon which it may be sustained quite independently of the question of winding up the concern, by showing that the Plaintiffs have a charge on the funds. Another objection which has been made is, that resort should have been had to the Winding-up Acts. But if the Plaintiffs are not partners, they have no right to petition under the Winding-up Acts.

There seems, on the whole, to me to be sufficient equity stated on this bill to entitle the Plaintiffs to an order, and I think that what was said in *Wallworth v. Holt* (a) is a strong authority in the Plaintiffs' favour. There Lord *Cottenham* said, "I think it the duty of this Court to adapt its practice and course of proceeding to the existing state of society, and not by too strict an adherence to forms and rules, established under different circumstances, to decline to administer justice, and to enforce rights for which there is no other remedy. This has always been the principle of this Court, though not at all times sufficiently attended to. It is the ground upon which the Court has, in many cases, dispensed with the presence of parties who would, according to the general practice, have been necessary parties." I am of opinion that an order for a receiver and manager must be made.

(a) 4 *Myl. & Cr.* 635.

AN  
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ACCOMMODATION BILL.  
*See* BILL OF EXCHANGE.

ACQUIESCENCE.

A husband survived his wife, who was one of several equitable tenants in common. He was advised by counsel that he had no title as tenant by the curtesy, his wife never having been in possession, and that if he intended to set up such a title, he ought not to sue with his infant daughter in a partition suit which was then in contemplation. The suit was nevertheless instituted by him as the next friend of the daughter, and in 1830 a decree was obtained. A partition was made under the decree, and the legal estate in the daughter's share conveyed to the use of the father during the infancy of the daughter, in trust for her maintenance, and

afterwards to her own use in fee. The daughter attained twenty-one in 1843, and married in 1847. In 1852 the father filed a bill to be relieved from the trusts, on the ground of mistake, and to have his title as tenant by the curtesy established: — *Held*, first, that length of time and acquiescence, and the marriage of the daughter, although without the father's consent, before the father disputed the daughter's title, constituted a sufficient answer to the suit. Secondly, that the Court has power to relieve against mistakes in law as well as against mistakes in fact; but that where relief is sought against the consequences of mistakes in law, the Court must be satisfied that the Plaintiff's conduct has been determined by those mistakes. Thirdly, that possession obtained in the character of trustee

trustee cannot be retained as one adverse to the cestui que trust, after the legal estate under which the possession was taken has determined. Fourthly, that the fact of the marriage having taken place on the faith of the daughter's interest being free from any estate by the curtesy, was sufficiently put in issue by statements in the answer to the effect that up to the marriage the father always told the daughter that the monies which he paid her were the balance of the rents after deducting the expenses of her maintenance, and that the land was her property, and never made any claim of right to them on his part. *Stone v. Godfrey*,

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See COVENANT, 2.

#### AFFIDAVITS.

See PRACTICE, 11.

TENANT FOR LIFE.

#### ANNUITY.

On a bill filed to set aside a deed securing an annuity as being void by reason of the return of the consideration under the sixth section of the Act 53 Geo. 3, c. 141 :—*Held*, in reference to an objection that no relief could be granted in Equity that the intention of the act was to give the same power to a Court of Equity, in regard to an annuity to be enforced by suit, as to a Court of Law in regard to an annuity to be enforced by action. *Held*, also, that the burthen of proof was on the Plaintiff to make out that there was a return of the

consideration within the meaning of the section; that if the consideration was actually paid to the grantor, the application of it by him in discharge of debts really due from him to the grantee would not be such return, nor (*semble*) would it be so even if the grantor had previously told the grantee that he would make such an application of it.

In this case, the Lord Chancellor, not being on the whole satisfied that the Plaintiff had established the return of the consideration, dismissed the bill, but without costs, on the ground that in a transaction of the nature of the one in question the Defendant was bound to have been prepared with clear proof in support of his title. *Pennell v. Smith*, 167

See PLEADING.

WILL, 2, 8, 12.

#### APPEAL.

See CHARITY.

PRACTICE, 1.

WINDING-UP ACTS, 2.

#### APPEAL IN BANKRUPTCY.

See BANKRUPTCY, 1, 8.

#### ARRANGEMENT DEED.

See BANKRUPTCY, 10.

#### BANKRUPTCY.

1. Before the Orders in Bankruptcy of 1852 came into operation, the Registrar of a District Court taxed the bill of the solicitors to the assignees without any one attending on

- on their behalf, and a small payment was made on account of the bill. Two years afterwards the assignees applied to the Commissioner for a retaxation, on the grounds of extravagant charges, and that they had only recently become aware of the contents of the bill :—*Held*, that the Commissioner ought, under the then existing law, to have reviewed the taxation. *Held*, also, that the question was not one of sufficient difficulty or importance to justify the Court in giving leave to appeal from its decision to the House of Lords. *Ex parte Bateman, In re Burbury*, 358
2. In an action to recover the balance upon an account current, a verdict for the Plaintiff was taken by consent, subject to a reference to an arbitrator, who was empowered to direct that a verdict should be entered for the Plaintiff or Defendant, and the costs were to abide the result of the award. After the award, which was in favour of the Plaintiff, and before judgment, the Defendant committed an act of bankruptcy, of which notice was given to the Plaintiff in the action, but judgment was nevertheless entered up upon the award. On the Defendant being adjudicated a bankrupt,—*Held*, that the amount for which judgment was entered up, with interest and costs, constituted a proveable debt. *Ex parte Harding, In re Pickering*, 367
3. The 160th section of the Bank-

- rupt Law Consolidation Act, which empowers the Commissioner to make an allowance out of the estate to such person as he shall think fit for the preparation of the balance sheet and accounts of the bankrupt, does not authorize an allowance to the official assignee, such an employment being inconsistent with his duties. *Ex parte Russell, In re Minnitt*, 373
4. A benefit building society is not entitled, on the bankruptcy of its treasurer, to priority over the other creditors. *Ex parte Bailey, In re Barrell*, 380
5. The scale of charges of an agent, employed by the assignees to sell the bankrupt's stock by tender, is properly settled by the rule adopted by the Court of Bankruptcy in London at an intermediate rate between that applicable to a sale by auction and that applicable to a sale by valuation.
- It is not incumbent on the Appellate Court to decide such a question, although both parties submit to its jurisdiction. *Ex parte Hunt, In re MacKenna*, 387
6. Where an assignment of all a bankrupt's property required for his trade, as a security for an antecedent debt, has taken place more than twelve months before the petition for adjudication, *semble*, that it is material for the assignees to show, for the purpose of avoiding the deed, that there still exists a debt which existed at the time of the execution of the assignment. *Ex parte Taylor, In re Taylor*, 392
7. Where



7. Where the petitioning creditor had, before petitioning for adjudication, arrested the bankrupt for the petitioning creditor's debt, and detained him in custody till he was discharged on his petition to the Insolvent Debtors Court, the Court of Appeal refused to annul the adjudication on that ground, until its validity had been tried at law. *Ex parte Watson, In re Watson*, 396

8. The sale of the bankrupt's estate is a matter peculiarly within the discretion of the Commissioner, with which the Court of Appeal will not interfere upon a mere doubt.

*Semble*, that the limitation of the time for appealing is not confined to decisions on adverse claims, but extends to administrative orders or directions. *Ex parte Ford, In re Flood*, 398

9. *A. B.* a publican, being indebted to *C. D.*, deposited with him the lease of a public-house and other houses accompanied by a memorandum expressly constituting *C. D.* equitable mortgagee of the leasehold premises and of the fixtures to the premises belonging: *A. B.* remained in possession of the premises and became bankrupt:—*Held*, reversing the decision of the Commissioner in Bankruptcy, that the fixtures, consisting of ordinary house fixtures and trade fixtures, were not in the order and disposition of the bankrupt within the 125th section of the Bankrupt Law Consolidation Act 1849, but belonged to the mortgagee.

By the word "fixtures," the Court understood such things as are ordinarily affixed to the freehold for the convenience of the occupier, and which might be removed without material injury to the freehold, and the removal of which by a tenant would not give a ground of action to the landlord.

Practice as to costs of equitable mortgagee's petition for sale. *Ex parte Barclay, In re Gawan*, 403

10. A deed of inspectorship, containing a covenant by a debtor for payment of his debts in full by instalments, and a covenant on the part of the creditors executing the deed not to sue in the meantime, but not providing, except in certain events, for the assignment of all the debtor's estate:—*Held*, not to be a deed of arrangement within the provisions of the Bankrupt Law Consolidation Act respecting arrangements by deed.

Before certifying that a deed has been executed by the majority required by those provisions, the Commissioner ought to be satisfied that the deed is one within the scope of them. *Ex parte Wilkes, In re Wilkes*, 418

#### BENEFIT BUILDING SOCIETY.

*See* BANKRUPTCY, 4.

#### BILL OF EXCHANGE.

An indorsee for value of an accommodation bill, without notice that it is one of that description, may, notwithstanding notice subsequently

quently acquired, release the drawer, without releasing the acceptor. *Ex parte Graham, In re Black*, 356

CALL.

*See* WINDING-UP ACTS, 2.

CHARITY.

Where property was devised in the sixteenth century in trust to apply the income for the perpetual sustentation of an almshouse for the comfort, placing and abiding of the poor within the city of R., and to provide six beds to harbour or lodge poor wayfaring men no longer than one night, to each of whom four pence was to be paid; and also in trust to purchase flax, &c. for setting the poor at work according to the 18 *Eliz.* c. 3; and the income of the property had greatly increased:—*Held*, that an administration of the charity, which made no increase in the number of wayfarers relieved, or in the amount of the viaticum, was not a proper one, and that a scheme ought to be directed upon an information being filed, although it did not pray relief in respect of the administration of this part of the charity.

*Quære*, whether the payment (after making provision for poor travellers) of the residue of the income to the parish officers in ease of the rates was a proper administration of the charity.

Where a charitable gift is am-

biguous, it may be interpreted by the aid of contemporaneous usage, but no length of usage will warrant a deviation from the terms of a trust which the Court regards as plain, and the Court did not hold itself bound as to such deviation by proceedings in former suits, in which the question did not directly arise.

There must be a substantial ground for an appeal on the part of defendants to a charity information to exempt them from payment of costs, and the intimation of the opinion of the Court below upon the substance of the case in pronouncing a decree which contained no declaration, and merely directed a scheme, was not held to constitute such a ground. *Attorney-General v. The Corporation of Rochester*, 797

CHURCH BUILDING SOCIETY.

*See* WILL, 6.

CONTRACT.

1. Money was advanced before the passing of the 17 & 18 *Vict.* c. 90, at 6*l.* per cent. on a promissory note, and a deposit of title deeds of freehold property as a collateral security. Afterwards it was agreed by parol that a legal mortgage should be executed by the borrower to secure the amount advanced with interest at 5*l.* per cent. per annum, but no mortgage was executed:—*Held*, that the parol agreement was sufficient

cient to change the contract to a legal one, and that a return and fresh deposit of the deeds was not necessary to take the second contract out of the Statute of Frauds. *James v. Rice*, 461

2. An agreement between a Railway Company and Railway contractors (who were also landowners) for the construction of a branch Railway, provided that the Company should find the land within a reasonable time and build the stations; that the contractors should give a bond to the amount of 50,000*l.* to secure the performance of the contract, and undertake to execute the work for a double line of Railway, and the ballasting and permanent way for a single line, according to the terms of a specification, to be prepared by the engineer for the time being of the Company; that the Company should work the branch in a reasonable and proper manner as compared to the remainder of the main Railway; and that in case of difference as to working, the same should be settled by arbitration; and that any of the details of the arrangement, in case of difference, should be determined by a referee to be appointed by the Solicitor-General for the time being:—*Held*, on demurrer, that this agreement was too vague, obscure and uncertain to be enforced in a specific performance suit, and that the stipulation as to the execution of a bond could not be enforced apart from the rest, being merely an incidental

and subsidiary part of the agreement, and not within the principle of *Lumley v. Wagner*, where the negative stipulation was a distinct and substantive part of the contract.

Though the Court may execute an agreement framed in general terms where the law will supply the details, yet if those details are to be supplied, in modes which cannot be adopted by the Court, there is no concluded agreement which can be enforced in equity. *South Wales Railway Company v. Wythes*, 880

See VENDOR AND PURCHASER, 2.

#### CONTRIBUTORY.

See WINDING-UP ACTS.

#### CONVERSION.

See WILL, 7.

#### CORONER.

After judgment of ouster upon an information in the nature of a quo warranto against a person returned by the sheriff as duly elected to the office of coroner, a new writ de coronatore eligendo issues as of course, and, *Held*, to be no ground for withholding the writ, that the judgment of ouster was founded upon the fact that the votes constituting the majority for the person returned were bad, and though it was alleged on oath that the result of a scrutiny would be to place the opposing candidate in a majority.

*Semble*, the sheriff cannot, under the

the provisions of the 13th section of the Act 7 & 8 Vict. c. 92, enter into the question of a scrutiny. *In re The Coronership of Hemel Hempstead*, 228

**COST BOOK.**

*See* PUBLIC COMPANY, 5.

**COSTS.**

*See* ANNUITY.

PRACTICE, 1, 9.

**COSTS, TAXATION OF IN BANKRUPTCY.**

*See* BANKRUPTCY, 1.

**COVENANT.**

1. On an agreement to sell part of a vendor's land, the vendor and purchaser entered into mutual covenants prohibiting building except in a specified manner, on the sold and unsold parts, with a stipulation for payment of liquidated damages in case of breach of covenant:—*Held*, 1. That a subsequent owner of the unsold part, claiming through the grantor by means of deeds, one of which referred to the deed containing the prohibitory clause, but not to that clause, was bound by the prohibition in equity. 2. That the circumstance of the grantor not having performed a covenant, to obtain for the grantee a direct covenant from the former purchaser, did not constitute a defence, it not appearing that any application had been made to the grantor for that purpose. 3. That notice of a right to

prevent building, and of an intention to enforce it, given before any expense was incurred, followed by a bill for an injunction, though not filed till four months afterwards, was sufficient to exclude a defence on the ground of laches, it appearing that the Plaintiff could not sooner establish his right to enforce the prohibition. 4. That the clause as to liquidated damages did not exclude the interference of the Court by interlocutory injunction.

*Coles v. Sims*, 1

2. Acquiescence in the violation of a covenant to a certain extent held a sufficient objection to an interlocutory application for an injunction against a greater violation of it.

Where on a motion for an injunction to restrain an alleged breach of covenant the question in dispute appeared doubtful,—*Held*, that the burden of proof was on the Plaintiff to show that the balance of convenience was in favour of granting the injunction. *Child v. Douglas*, 739

**DECISIONS.**

*See* LANDLORD AND TENANT.

POLICY, 2.

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**DEEDS.**

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**DOWER.**

*See* HUSBAND AND WIFE, 2.

**ELECTION.**

Upon a marriage, an undivided eighth share in remainder in fee, belonging to the wife expectant on a life estate in the entirety, was settled in trust for the wife for life, with remainder to the husband for life, with remainder to the children in tail, and remainder to the heirs of the wife, and a power of sale and exchange was given to the trustees, who were to invest the proceeds in the purchase of realty in possession, and hold it on the trusts declared respecting the reversionary interest thus settled. The entirety of a portion of the estate was sold, in concurrence with the trustees of the settlement, by the other parties interested in the estate. By the purchase deed an eighth part of the purchase-money was apportioned according to the values of the life interest and the reversion in that share, and the value of the reversionary interest was expressed to have been paid to the trustees of the settlement. In point of fact, however, the whole eighth part was invested in consols, the dividends of which were paid to the tenant for life of the entirety. This state of things continued after the death of the wife (who died without leaving issue) during the lives of her husband and heir at law successively, but there was no evi-

dence of their intention as to the destination of the fund beyond what was to be inferred from the above course of dealing with it:—*Held*, that an election could not be inferred to take the property in its actual state, and that on the death of the heir at law his share of the fund was to be treated as part of his real estate. *Held*, also, that it did not pass by his will under a devise of all such shares as he might at his death possess in the estate, there being a part of it remaining unsold to answer the description. *Pedder's Settlement, In re*, 890

**EQUITY TO A SETTLEMENT.**

*See* HUSBAND AND WIFE, 1.

**EVIDENCE.**

*See* PRACTICE, 2, 5.

**EXECUTORS.**

*See* LIMITATIONS, STATUTE OF, 1.  
POLICY, 3.

**FIXTURES.**

*See* BANKRUPTCY, 9.

**FORECLOSURE.**

Where a common foreclosure claim was supported by affidavits of the attesting witnesses to the mortgage deed, and the Defendant, who was the heir at law of the alleged mortgagor, did not cross-examine the witnesses, but set up, by affidavit, the insanity of the alleged mortgagor

gagor at the time of the alleged mortgage:—*Held*, that without instituting a suit of his own to set aside the mortgage, he might have its validity tried by an issue or an ejectment. *Jacobs v. Richards*,

55

### FOREIGN LAW.

A question of foreign law, being one of fact, must be decided in each cause on evidence adduced in it, and not by a decision or on evidence adduced in another case, although similarly circumstanced. *M'Cormick v. Garnett*,

278

### FRAUDS, STATUTE OF.

A defence founded on the Statute of Frauds may be taken by demurrer.

A demurrer, for that it appears on the bill that the agreement therein alleged to have been entered into, is not in writing signed by the Defendant, is not a speaking demurrer.

A memorandum that *A.* had paid to *B.* 50*l.* as a deposit in part payment of 1,000*l.* for the purchase of a house, the terms to be expressed in an agreement to be signed as soon as prepared:—*Held*, not a sufficient agreement in writing.

An allegation that the Defendant had approved of a draft agreement, but asked that in order to save him the trouble of waiting till it was copied, he might be allowed to call and sign the fair copy in the morning, which he promised but failed to do:—*Held*, not a sufficient alle-

gation of fraud to preclude him from setting up the Statute of Frauds as a defence. *Wood v. Midgley*,

41

See CONTRACT, 1.

### FREEBENCH.

See HUSBAND AND WIFE, 2.

### HUSBAND AND WIFE.

1. Where a husband and wife are domiciled in *Scotland*, in which country a wife has no equity to a settlement, the Court here will order payment of the wife's legacy to an assignee of the husband. *M'Cormick v. Garnett*,
- 278
2. The Dower Act does not apply to freebench.

The purchaser of a copyhold held of a manor, the custom of which entitled widows of the copyholders to freebench in one moiety of the lands of which their husbands died seised, took a surrender, but died before admittance:—*Held*, that his widow was not entitled to freebench at Law or in Equity. *Smith v. Adams*,

712

3. In making a settlement of property belonging to a wife, the Court looks not only to the portions of her fortune which the husband may have already received, but to all the circumstances of the case, and particularly to the husband's conduct.

Where therefore a widow about to marry again assigned all her property except a life interest in the

the income of 10,000*l.* Consols to which she was entitled under a former settlement, in trust for her separate use during the coverture, and afterwards in trust for herself, if she survived, or, if not, for the second husband, and it appeared that he had married her from interested motives only, and there had been a divorce *à mensa et thoro* for adultery on his part, the Court settled the whole income of the 10,000*l.* Consols on the wife, irrespectively of the question whether it had been by mistake or otherwise left out of the settlement. *Barrow v. Barrow*, 782

#### INCOME TAX.

See VENDOR AND PURCHASER, 3.

#### INCUMBERED ESTATES, IRELAND, ACT.

An attachment may issue in this country to enforce an order for payment of money made in *Ireland* on petition under the Irish Incumbered Estates Act. *In re Keogh*, 73

#### INJUNCTION.

1. On a motion for an injunction as to a matter merely pecuniary, the Plaintiff cannot succeed without satisfying the Court, not merely that there is a case to be tried, but that there is some probability of the bill not being dismissed at the hearing.

An information to restrain a

municipal corporation from applying the borough fund or raising a rate for the purpose of opposing a bill in parliament, the object of which was to interfere with the sewage and drainage of the town,—*Held*, not a suit in which success was sufficiently probable to entitle the relator to an interlocutory injunction. *Attorney-General v. The Mayor, Aldermen and Burgesses of Wigan*, 52

2. Where a Plaintiff claiming a copyright in a work of a foreigner obtained an injunction, on giving an undertaking to abide by any order the Court might make respecting damages, and the law was, pending the suit, finally settled against the existence of such a copyright,—*Held*, that the Defendant was entitled to have the damages sustained by him ascertained as correctly as practicable and paid, and that a mere dismissal of the bill with costs was not a sufficient accurate assessment and award of damages. *Novello v. James*, 876  
See COVENANT.

#### INROLMENT.

See PRACTICE, 3.

#### INTEREST.

A Railway Company having agreed to let its line to another, which had taken possession under the agreement, filed a specific performance bill against the other, which thereupon discontinued paying rent. The Plaintiffs then gave the Defendants notice, that, unless the

the rent were paid, interest would be claimed on it under 3 & 4 Will. 4, c. 42, s. 28. The lessees obtained ex parte an order that they might be at liberty to pay the rent into Court, and paid it in accordingly: — *Held*, that they thereby obstructed the recovery of interest at law, and that the Court had jurisdiction to order payment of interest. *Hull and Selby Railway Company v. North Eastern Railway Company*, 872

INTERPLEADER.

*See* POLICY, 2.

JOINT-STOCK COMPANY.

*See* PUBLIC COMPANY, 1.

LACHES.

*See* COVENANT, 1.

LANDLORD AND TENANT.

In pursuance of an arrangement made on behalf of a Joint-Stock Company with certain persons to purchase the beneficial interest in a colliery lease agreed to be granted to them for a term of forty years, a lease was granted in *March* 1842 to three persons, as trustees for the Company, for a period of forty years, at a fixed rent, together with a royalty. The lease contained a stipulation enabling the lessees, at the end of any period

of three years from its commencement, to determine the lease by giving twelve months' notice. The Company entered into possession on *December* 1841, and remained in such possession till *November* 1842, when the working proving unprofitable was abandoned and never afterwards resumed. In *January* 1850 the Company was dissolved, and its affairs ordered to be wound up under the provisions of the Joint-Stock Companies Winding-up Acts. The lessor became bankrupt in *August* 1853. Some time prior to his bankruptcy his interest in the mine became vested in the Plaintiff. In *May* 1852 the official manager of the Company, under protest that the lease was not binding on the Company, gave notice to terminate the lease on the 31st of *May* following, when one of the triennial periods expired. On the 23rd of *February* 1853 the Plaintiff filed his bill against the official manager of the Company, praying a declaration that the Company had accepted the lease and were bound thereby, and that the official manager might be ordered to pay the arrears of the stipulated rent since *March* 1842, together with compensation for all breaches of covenant:—*Held*, that no relief in the nature of specific performance, nor any equitable relief, could be granted either against the persons to whom the demise was made or against the Company in respect of their occupation, the rights



rights of the Plaintiff, if any, being legal.

The case of *Clavering v. Westley*, 3 P. W. 402, so far as it might be an authority for the recovery of the rent as an equitable debt, disapproved. *Walters v. The Northern Coal Mining Company*, 629

#### LEGACY.

See WILL.

#### LIMITATIONS, STATUTE OF.

1. Where an indorsement on a promissory note of payment of interest made by the authority of a deceased holder, appears to have been made, after the Statute of Limitations had run, it is not evidence to exclude the operation of the Statute.

Where the Statute of Limitations had run against a debt, due from a testator before his death, and the executor wrote thus to the creditor, "The legatees object to my paying the claim though I think it just," and "I not only do not dispute the claim, but admit it, thinking it just, but am compelled to refuse payment without an order of the Court:"—*Held*, that the debt was not revived, and that the real estate could not be subjected to it by any act of the devisees in trust, though they were also executors.

Where an executor does not set up the Statute of Limitations on a creditor's administration summons, the residuary legatees cannot set it up against the Plaintiff.

*Secus*, as to cestuis que trustent of devised estates, who would have been necessary Defendants but for the Chancery Amendment Act. *Briggs v. Wilson*, 12

2. A contract for the sale of an estate made in March 1811, stipulated that the purchase-money should be paid on the 13th of May following. The purchase-money was not paid, but the purchaser entered into possession, and he and persons claiming under him continued in such possession. In 1834 their agent signed a written acknowledgment of the vendor's title sufficient to take his lien for the principal of the purchase-money out of the Statute of Limitations 3 & 4 Will. 4, c. 27, s. 40. In 1849 the assignees of the vendor filed a bill seeking to enforce the vendor's lien on the estate for the purchase-money:—*Held*, that the 42nd section of the Statute did not apply to the arrears of interest, but that the whole was recoverable from the 13th May 1811. *Toft v. Stevenson*, 735  
See TENANT FOR LIFE.

#### LUNACY.

1. A petition presented after the death of a lunatic by his executors, for payment of the balance paid into Court, must be served on the committee, although he has passed his accounts and his security has been discharged. *In re Wylde*, 25
2. The costs of issuing a commission of lunacy, if for the lunatic's benefit and after the lunatic's death,  
may

may be proved against the lunatic's estate, notwithstanding the pendency of a traverse of the inquisition. *In re Cumming*, 30

3. Under 11 *Geo. 4 & 1 Will. 4*, c. 65, authorizing monies to be raised by sales or mortgages of lunatics' estates, and providing that the lunatics' heirs, next of kin, &c., shall have the like interest in the surplus monies so raised as they would have had in the estate if it had not been so dealt with, and that such monies shall be of the same nature as the estate:—*Held*, that where a lunatic's heir had died also a lunatic, and without having elected to take such surplus monies as personalty, they were impressed with the character of realty. *In re Wharton*, 33

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MANAGING COMMITTEE.

*See* WINDING-UP ACTS, 2.

MINES.

*See* VENDOR AND PURCHASER, 2.

MISREPRESENTATION.

*See* RECTIFICATION OF DEEDS.

MISTAKES OF LAW.

*See* ACQUIESCENCE.

MORTGAGE.

A corporation raised money under an Act of Parliament on mortgages of the tolls and additional works of a canal, and, acting on what the Court of Appeal (differing from the Court below) decided to be an erroneous construction of the Act, Vol. V.

applied part of the money so raised in paying off old mortgages affecting other property of the corporation. On the tolls and additional works proving an insufficient security,—*Held*, that the new mortgagees were entitled to follow their money so far as it had been erroneously applied, and to stand in the place of the old paid-off mortgagees as against the other property of the corporation. *Trevillian v. Mayor, &c. of Exeter*, 828

MORTMAIN.

*See* WILL, 6, 9.

MUNICIPAL CORPORATION.

*See* INJUNCTION, 1.

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NOTARIES PUBLIC.

*See* PRACTICE, 11.

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OFFICIAL MANAGER.

*See* WINDING-UP ACTS, 2.

ORDER AND DISPOSITION.

*See* BANKRUPTCY, 9.

OUTLAWRY.

*See* VOLUNTARY SETTLEMENT.

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PATENT.

A writ of scire facias having issued out of Chancery to repeal certain letters-patent, the patentee presented a petition to the Common Law side of the Court, alleging that

that the writ contained improper recitals and suggestions, which, if used as a defence in an action at law for the infringement of a patent, would be inadmissible, and praying that the writ might be quashed or reformed by striking out the objectionable matter:—The Lord Chancellor declined to exercise the jurisdiction reserved to him by the 46th section of the Act 12 & 13 *Vict.* c. 109, on the ground that, by the 39th section of that Act, jurisdiction in such cases was conferred on the judges of the Superior Courts of Common Law, and that they could more satisfactorily dispose of the question of pleading involved in the case. *The Queen v. Hancock*, 332

#### PLEADING.

A bill filed against a Railway Company, by the grantee of an annuity charged on land taken by the Company, stated that, before the grant of the annuity, the land was subject to a mortgage in fee, which had since been paid off, but that there had been no reconveyance; that the Defendants, under the powers of their Act, had given the Plaintiff notice to treat for the land charged with the annuity, but without any further proceeding had taken possession of the land. The prayer was, that the Company might be decreed to pay the arrears of the annuity and to secure the future payment of it. The defence made by the answer and evidence was, that the Company had

purchased from the prior incumbrancer under a power of sale:—*Held*, that the Plaintiff could not on such pleadings enforce a specific performance of the notice to treat regarded as a contract to purchase the Plaintiff's interest.

The prayer for general relief is not available for the purpose of obtaining a decree at variance with the case made by the statements of the bill. *Hill v. The Great Northern Railway Company*, 66  
See FRAUDS, STATUTE OF.

#### POLICY.

1. A life policy was subject to a condition making it void if the assured went beyond the limits of *Europe* without licence. An assignee of the policy, on paying the premium to a local agent of the assurance society, at the place where the assurance had been effected, informed him that the assured was resident in *Canada*. The agent stated that this would not avoid the policy, and received the premiums until the assured died:—*Held*, that the society were precluded from insisting on the forfeiture. *Wing v. Harvey*, 265
2. A Life Insurance Company received notice of an assignment by an insurer of a policy, which the Company had granted, and the insurer afterwards became insolvent. Soon after the death of the person whose life was insured, the assignee for value applied for payment of the sum due upon the policy, and the Company inquired of the  
the

the provisional assignee of the insolvent whether he would consent to payment being made to the assignee for value. The provisional assignee said he could not give such consent, but that it must be sought for from the Court of Insolvent Debtors. The insolvent himself gave notice to the Company not to pay over the policy monies to his assignee for value, on the ground that the debt for which it was assigned as a security was satisfied. In the meantime an action was brought upon the policy by the assignee for value, in the name of the insolvent, against the Company:—*Held*, that it was not a case in which the Company were entitled to file their bill of interpleader against the Plaintiff in the action, the insolvent and his provisional assignee, the insolvent having no title, and the title of his provisional assignee being subordinate to that of the assignee for value.

The case of *Fenn v. Edmonds*, 5 *Hare*, 314, overruled. *Desborough v. Harris*, 439

3. One of the makers of a joint and several promissory note, who was a surety for the other, effected an insurance on the life of the latter, with his privity and concurrence, for an amount equal to that secured by the note. The principal died, having appointed the surety his executor, and the surety received the insurance money:—*Held*, that to the extent to which it was not required for indemnify-

ing the surety, it ought to be applied in payment of the debt. *Lea v. Hinton*, 823

#### POWER OF APPOINTMENT.

*See WILL*, 15.

#### POWER OF SALE.

*See WILL*, 3.

#### PRACTICE.

1. When an appeal which is dismissed has been recommended by the Judge of the Court below, no costs are in general given. *In re Colquhoun*, 35
2. On the examination of witnesses orally, under the 15 & 16 *Vict.* c. 86, the mere circumstance of a document being put into a witness's hands by the party examining him in chief, for the purpose of verifying the handwriting, does not entitle the other side to inspect the document. *Lord v. Colvin*, 47
3. *Quære*, whether the inrolment of an order, refusing with costs a motion for injunction, precludes the renewal of the motion before the Court of Appeal. *Attorney-General v. The Mayor, Aldermen and Burgesses of Wigan*, 52
4. The filing of a traversing note against one Defendant does not preclude the Plaintiff from moving for a decree, and he is entitled to a certificate from the Clerk of Records and Writs, of the filing of the note, and of the answer of the other Defendant, to enable him to enter the cause for hearing with the Registrar. *Maniere v. Leicester*, 75
5. Where

5. Where a Defendant tendered himself for examination *vidæ voce* below, and the Plaintiff opposed his examination, the Court of Appeal declined acceding to a proposition of the Plaintiff to examine him. *Hindson v. Weatherill*, 301
6. Motion to dispense with service on a Defendant of a copy of a decree on a bill, taken *pro confesso* before the lapse of three years, refused. *James v. Rice*, 461
7. Every day in term is a motion day; and therefore, under the 79th Order of May 1845, notice in the Gazette of a motion to be made on any day in term, to take a bill *pro confesso*, is good. *Chaffers v. Baker*, 482
8. Practice as to costs of parties to a Special Case under the Act 13 & 14 Vict. c. 35, where the estate in reference to which the question arises has been administered. *Hindle v. Taylor*, 577
9. An overstatement on the part of mortgagees in possession of a colliery as to the balance represented by them as remaining due on their mortgage, and their refusal to furnish accounts to the mortgagors, except on being paid the expenses of so doing,—*Held*, not such vexatious conduct as to deprive them of their costs of a redemption suit.  
On their appealing from a decree disallowing such costs, they were held entitled to have their costs of the appeal. *Norton v. Cooper*, 728
10. Under the 56th section of the Statute 15 & 16 Vict. c. 86, the

Court has power to dispense with the rule, that an abstract of title upon a sale, under an order by private contract, shall be laid before the conveyancing counsel. *Gibson v. Woollard*, 835

11. Affidavits may be still sworn before notaries public in foreign countries (having authority there to administer oaths) according to the old practice, which is not altered in this respect by 15 & 16 Vict. c. 86, s. 22. *Haggitt v. Iniff*, 910
12. Where a portion of a trust fund has been lost, that is *prima facie* a breach of trust, and a sufficient ground for the appointment of a receiver on an interlocutory application:—*Held*, also, that objections to the bill, on the ground of misjoinder, multifariousness or want of parties, were no answer to such an application.

On a bill filed by a Plaintiff insured in a society (whose funds were liable to pay the insurance money), on behalf of himself and other persons so insured, charging a loss of the fund through the negligence of the Directors, and on the answer and affidavits showing that the Secretary had absconded with part of the funds, and that some of the Directors were in needy circumstances,—*Held*, that the Plaintiff was entitled to the appointment of a receiver and to an injunction. *Evans v. Coventry*, 911

See ANNUITY.

FORECLOSURE.

INJUNCTION.

PRINCIPAL

PRINCIPAL AND AGENT.

*See* POLICY, 1.

PRINCIPAL AND SURETY.

Two bankers carried on business under articles of partnership, providing that if at the end of five years, for which the partnership was to continue, either partner should wish to carry on the business, and should not take the share of the other at a valuation, the assets should be realized, the debts paid, and the surplus divided. Simultaneously with the execution of the articles a surety for one of the partners entered into a bond to indemnify the other against all loss in respect of the partnership. The business of the bank was continued by the firm for more than a year after the expiration of the five years :—*Held*, 1. That by this continuation the surety was discharged. 2. That whether that circumstance would afford a defence to an action on the bond or not, a Court of Equity would restrain the obligee from proceeding in such an action. *Small v. Currie*, 141

PRO CONFESSO.

*See* PRACTICE, 6, 7.

PUBLIC COMPANY.

1. The deed of settlement of a Joint-Stock Company provided for the transfer of shares, with the approbation of the Directors. Some of the shareholders threatened to take proceedings to set aside a purchase and lease for fraud, whereupon the

Directors agreed with them that they should be allowed to transfer their shares on payment to the Company of a sum, out of which a claim of one of the Directors against the Company should be satisfied. The money was paid and the claim satisfied out of it, and the shares transferred to nominees of the Directors for a nominal consideration :—*Held*, that the transaction was inconsistent with the duty and beyond the power of the Directors, and that the shareholders were, notwithstanding the transfer, properly placed on the list of contributories under the Winding-up Acts.

Directors of Joint-Stock Companies are in a sense trustees. *Bennett's Case*, 284

2. A registered Insurance Company agreed to sell its business to another registered Insurance Company, and a deed of assignment was accordingly executed, whereby the latter Company covenanted to indemnify the former against all claims. After the business had been carried on for some time by the purchasing Company that Company failed, and both Companies were wound up under the Winding-up Acts. On the official manager of the selling Company tendering a proof against the purchasing Company in respect of claims satisfied by the selling Company, one part of the deed of assignment was produced having affixed to it the seal of the purchasing Company, but another part,

part, alleged to have been executed by the selling Company, was not forthcoming:—*Held*, 1. That after what had taken place, it was unnecessary to determine whether the selling Company had executed the purchase-deed, or whether its Directors had exceeded their powers in making the sale. 2. That, where a purchaser has enjoyed the subject-matter of a contract, every presumption must be made in favour of its validity. 3. That, if all the proceedings on the part of the Directors of the purchasing Company, with reference to the purchase, had not been in strict accordance with their own deed, still if the contract with the other Company was the means of the purchasing Company coming into existence, they could not act in contravention of that contract.

*Port of London Assurance Company's Case*, 465

3. The subscription contract of a projected Banking Company recited that the capital was agreed to consist of 1,000,000*l.*, with power to increase it to 3,000,000*l.*, and that application had been made to the crown for a charter, nominated certain persons Directors until the charter should be obtained, with power for them to arrange the terms of the charter in such manner as they should think necessary in compliance with the requisition of the government, and to narrow or extend the objects of the Company as might be necessary. When the charter

should have been sealed, the Directors were empowered to prepare a deed of settlement and to call for a first instalment from the subscribers, and to declare a forfeiture of the shares of any subscribers who did not execute such deed of settlement. A charter was obtained incorporating the Company with a capital of 644,000*l.*, and power to increase it to 1,000,000*l.* with the consent of the Lords of the Treasury. A call was made and a deed of settlement prepared reciting the charter, the call and its payment by the parties to the deed of settlement:—*Held*, 1. That the power of the Directors was not terminated on the grant of the charter. 2. That the charter was not inconsistent with the subscription contract. 3. That the call was properly made. 4. That the deed of settlement was binding on the subscribers to the subscription contract; but, 5. That as the deed of settlement made the payment of the call a requisite preliminary, and the subscription contract did not make non-payment of the call a ground for forfeiture, the Directors could not declare a forfeiture for non-execution of the deed of settlement. *Norman v. Mitchell*, 648

4. The 7 & 8 *Vict.* c. 110, s. 29, requiring that a contract or dealing between a Company and any Director shall be submitted for confirmation "to the next general or special meeting of the shareholders, to be summoned for that purpose,"—*Held*, to mean that the contract

contract or dealing shall be submitted either to the next general meeting of the shareholders, or to a special meeting of the shareholders summoned for that particular purpose.

Where a report was read and adopted at a general meeting, and contained a notice of a resolution respecting an advance of money by Directors of the Company :—*Held*, that it was a sufficient submission to the shareholders of the terms of the advance, supposing it to be a contract or dealing within the meaning of the above section, as to which *quære*.

The case of *Teversham v. Cameron's Coalbrook, &c., Railway Company* (3 De G. & S. 296) observed upon. *Murray's Executors' Case*,

746

5. The rules of a Mining Company, carried on upon the cost-book principle, provided that no shareholder should dispose of his shares without giving notice in writing to the purser of the intended transfer, and that every transfer should be according to a particular form provided for that purpose. The form was printed, and contained a notice that no transfer was valid or complete unless entered in the cost-book and acknowledged by the purser. A shareholder agreed to transfer his shares, and the proposed transferee stipulated that the transferrer should pay the calls then due. They went together to the office of the Company, and deposited with the pur-

ser a transfer of the shares executed by them both and in the required form, and the transferrer paid the calls, but no notice in writing was given of the transfer, nor was there any formal acknowledgment on the part of the purser :—*Held*, that the transferee was properly placed upon the list of contributories. Also, that he was liable to the debts of the Company incurred before the transfer. *Semle, by the Lord Chancellor*, that where partnership articles provide that a partner may transfer his shares, they mean that he may so transfer them as to put the transferee in his place as to antecedent liability. *Mayhew's Case*, 837

6. A Railway Company, a short time before the expiration of the time limited by their Act for the compulsory purchase or taking of lands, gave a notice to treat for the purchase of the right or easement of making and for ever maintaining their railway by throwing a bridge over a yard belonging to a manufactory. The owner, after the expiration of the Company's compulsory powers, gave a counter-notice requiring the Company to take the whole of the manufactory. The Company did nothing upon the notice and counter-notice for nearly twelve months; they then gave a notice for the purchase of the whole manufactory, and proceeded to take steps for summoning a jury to assess its value :—*Held*, on an application by the owner for an injunction, that,  
whether



whether the original notice to treat was valid or not, the Court must not, after the counter-notice which has been given by the landowner, interfere with the proceedings of the Company. This decision being, however, without prejudice to any steps which the owner might take at law to stay or suspend those proceedings.

A notice to treat for the purchase of such a right or easement as that above mentioned, is not a notice warranted by the Lands Clauses Consolidation Act 1845, the word "incorporeal" used in the said Act being taken as a meaning of the word "rights," signifying a corporeal incorporeal, and therefore not including a right of way. *See, per Lord Chancellor.*

Such a notice to treat as that above mentioned did not confer on the owner a right to give a counter-notice requiring the Company to make the whole of the manufactory, because a right of way would not be considered as part of the manufactory. *See, per Lord Chancellor.*

Where a valid notice has been given to make part of a house or manufactory, and on that a valid counter-notice has been given to make the whole, the notice and counter-notice will be treated as constituting one notice for the purpose of enabling the jury to assess the value of the property forming the subject-matter of the notice and counter-notice. *See, per Lord Chancellor.*

When a Company has given a valid notice to take land,—*Held, (by the Lord Chancellor,)* that it is competent to the landowner to apply at once for a mandamus to compel them to proceed to complete the purchase, and he cannot therefore at a subsequent time urge delay on the part of the Company as a ground for the interference of a Court of Equity with their taking proceedings to obtain the land. *Pinchin v. The London and Blackwall Railway Company, 851*  
See CONTRACT, 2.

#### RAILWAY SHARES.

See VENDOR AND PURCHASER, 4.

#### RECEIVER.

See PRACTICE, 12.

#### RECTIFICATION OF DEEDS.

Upon a treaty of marriage, the father of the intended wife said to the Plaintiff, the intended husband, "I pledge you my word, that after the death of my wife and myself, my daughter will have 10,000*l.* at the very least." Heads of articles which were subsequently drawn up under the sanction of and approved by the father, and intended as instructions for a settlement, contained the following passage:—"A covenant is to be drawn up by which Sir W. H. (the father) guarantees that his daughter shall at the decease of both parents have a property of not less than 10,000*l.*" In the settlement which

was afterwards executed before the marriage there was a recital to that effect, but there was no express covenant by the father to make good that sum. On a bill filed by the husband who had survived his wife, against the executor of the father,—*Held*, that although the settlement, if it stood alone, could not have been rectified, yet that having regard to the articles and representation made by the father, there was sufficient evidence of mistake to authorize the Court to make the settlement conformable to the articles, and that the estate of the father was bound to make up the portion of his daughter to the stipulated sum.

*Held*, also, that the representation of the father, though not afterwards fulfilled, yet being of intention merely and not of fact, did not amount to such a misrepresentation as would entitle the husband to relief in equity on the ground of fraud. *Bald v. Hutchinson*, 558

#### REDEMPTION SUIT.

*See PRACTICE*, 9.

#### RENT.

*See INTEREST*.

#### RESCINDING CONTRACT.

*See VENDOR AND PURCHASER*, 2.

#### REVOCATION.

*See WILL*, 13.

#### SHIP.

A part owner of a ship, whose share was subject to a mortgage, agreed

with the other part owner (whose share was not subject to any mortgage), but without the concurrence of the mortgagee, to purchase guano on the joint account of the two part owners, and bring it in the ship to *England*. On the completion of the voyage, and when the cargo was about to be discharged, the mortgagee took possession:—*Held*, that he had no claim against the owner of the mortgaged share for freight, and could, at the utmost, only claim to adopt the mortgagor's contract, and to stand in his place as to the profits of the adventure, after deducting all expenses. *Alexander v. Simms*, 57

#### SOLICITOR.

1. Where several Defendants retain the same solicitor, each of them can only be charged with his proportion of the general costs of proceedings taken on behalf of all. *In re Colquhoun*, 35
2. A trustee under a will committed a breach of trust by lending trust monies to his co-trustee upon a mortgage for a term of years. An administration suit was instituted, and he was ordered to pay the money into Court. He sold part of the mortgaged property under a power of sale in the mortgage, and, on the application of two of the cestuis que trustent, the proceeds were paid into Court, subject to an order that they were not to be paid out without the consent of the purchaser. The trustee's solicitors refused

refused to give up the mortgage deeds unless upon payment of their bill of costs :—*Held*, 1. That the circumstances of the realization of the trust fund by the trustee's solicitors, and of the cestuis que trustent availing themselves of that realization, did not entitle the trustee's solicitors to a lien on the deeds or on the fund in Court, as against the cestuis que trustent, but that they could have no higher claim against the deeds or the fund than that of their client, the trustee.

2. That by instituting an administration suit, and obtaining an order against the trustee personally for payment of the trust monies into Court (which order had not been obeyed), the cestuis que trustent had not waived their right to pursue the trust money into the unauthorized investment. *Francis v. Francis*, 108

3. An executrix and trustee under a will employed her co-trustee, who was a solicitor, to transact the necessary legal business of the trust :—*Held*, that the solicitor was only entitled to costs out of pocket.

The principle of the general rule applicable to such cases explained.

The case of *Cradock v. Piper*, 1 *Mac. & G.* 664, and, in connexion with it, that of *Lincoln v. Windsor*, 9 *Hare*, 158, remarked upon. *Broughton v. Broughton*, 160

4. An attorney had advanced to a client in humble circumstances the necessary funds to prosecute actions of ejectment, which were conducted by the attorney, and termi-

nated in a compromise, on which the client received a large sum of money. During the proceedings the widow of the client's brother wrote a letter to the client saying that she had little money to spare, but wished to do all she could so that justice might be done to every branch of the family. The attorney wrote an answer to this letter by the client's direction, saying, that if the client succeeded, substantial justice should be done to all to whom the client was related. Neither the brother's widow, nor any of the client's relatives, gave him any assistance in prosecuting the actions. The attorney, by his directions, prepared a will, which the client executed, and under which the attorney took large benefits, but in which benefits were also given to relatives of the testator. It did not appear that the letter of the brother's widow, or the answer to it, was referred to in the course of the preparation of the will either by the attorney or the client :—*Held*, 1. That the will was not made under any mistake or misapprehension caused by the attorney. 2. That the circumstance of a solicitor preparing for a client a will containing dispositions in his own favour, does not of itself take away the right of the solicitor to be for his own benefit a devisee or legatee. 3. That the considerations applicable to a gift inter vivos from a client to his solicitor, are not universally applicable to a testamentary

mentary disposition. *Hindson v. Weatherill*, 301

5. Where a bill of costs has been delivered and security given for the amount, that is equivalent to payment, for the purpose of precluding taxation without special circumstances.

After the delivery of a solicitor's bill, and on the occasion of a purchase by the client, and of a mortgage to raise part of the purchase-money, which the client required in order to complete the purchase, the client executed a mortgage to the solicitor for a round sum, which included and exceeded by a small amount the bill of costs and the amount of certain advances made formerly by the solicitor to the client. Some time afterwards, the client applied for and received the excess, and subsequently the mortgage was transferred, with the client's concurrence:—*Held*, that this amounted to payment of the bill, so as to preclude taxation without further special circumstances than the above.

Where a solicitor pressed for the amount of his bill, but offered an opportunity of taxation, and apprised his client that it would be difficult to have the bill taxed after payment, and the client chose to pay without taxation, and afterwards applied to have the bill taxed without showing overcharges amounting to fraud:—*Held*, that the application ought to have been dismissed with costs. *In re Boyle, Ex parte Turner*, 540

## SPECIAL CASE.

See PRACTICE, 8.

## SPECIFIC PERFORMANCE.

The rule that he who seeks equity must do equity, is restricted to an equity in respect of the subject-matter of the suit.

Where therefore in a deed of dissolution of partnership, one partner assigned certain foreign shares (which were recited to be transferable, as it was believed, by delivery), and covenanted for further assurance; and the other partner covenanted to indemnify the former against certain liabilities; and it afterwards appeared that the shares were not transferable by delivery, but required a formal act to complete the assignment:—*Held*, in a specific performance suit instituted by the assignee of the shares, that he was entitled to have the assignment completed, although there might in the meantime have been on his part a failure to perform the covenant of indemnity. *Gibson v. Goldsmid*, 757

See VENDOR AND PURCHASER, 1.

## STAMP.

1. The taxing master ought not to require a receipt stamp to be affixed to counsel's signature to a fee before allowing the charge on taxation. *In re Beavan*, 40
2. A written authority, signed by a creditor, directed to his debtor and delivered to A. B. in this form:—  
"I hereby authorize you to pay A. B.

*A. B.* the sum of £——, being the amount of my contract, he having advanced me that sum," is a good assignment, if stamped as such, without being stamped as an order for payment. *Diplock v. Hammond*,

320

#### TENANT FOR LIFE.

A tenant for life discharging an incumbrance upon the estate is presumed to have intended to keep the charge alive against the inheritance for his own benefit, and the absence of an assignment will not conclude him; but a similar presumption does not arise from the payment by a tenant for life of bond debts, which, even if assigned, only place him in the same position as any other bond creditor.

A testator, being indebted by bond, devised certain real estate to his son for life, with remainder, subject to a term for the payment of legacies, to his grandson in tail, and died. Upwards of twenty years after the date of the latest of the bonds, the tenant for life and his assignee for value filed their bill against the tenant in tail and the legatees, alleging that the tenant for life had paid off the bonds, and seeking to stand in the shoes of the obligees as against the inheritance. The tenant in tail pleaded the Statute of Limitations, the other legatees did not:—*Held*, that the payment of the bonds by the tenant for life did not constitute him an in-

cumbrancer on the estate, and that the bonds themselves, being more than twenty years old, the presumption was that they had been satisfied.

*Semble*, the plea of the Statute of Limitations, under the circumstances, by the tenant in tail enured for the benefit of all the defendants.

In *June* 1854, the tenant for life made an affidavit, verifying payment of the bonds, and died in *August* following: a supplemental suit was instituted by the surviving Plaintiff, who, in *February* 1855 filed the affidavit in the original and supplemental suits; the Lord Chancellor, in the absence of any motive attributable to the Plaintiff for not having filed the affidavit in the interval between the date of its being sworn and the death of the deponent, received it with some qualification. *Morley v. Morley*,

610

#### TRAVERSING NOTE.

See PRACTICE, 4.

#### TRUSTEE.

1. A testator, by his will, gave the residue of his property to three trustees, whom he appointed executors, upon trust to sell and invest the same and to pay the income thereof to his widow for life, and after her decease, to his children, who were all infants at the time of his death. The eldest child attained twenty-one in the year 1839, and the youngest in 1846. The

three

three executors proved the will, but one of them almost exclusively acted. The money which was the proceeds of the estate was suffered by two of the executors to remain in the hands of the third, who ultimately became insolvent. On the youngest child attaining twenty-one, he, on behalf of himself and his brothers and sisters, attempted to obtain payment from the acting executor, and in 1848 wrote to him a letter consenting to receive payment of the amount then admitted to be due by annual instalments. In 1849, and shortly before the insolvency of the acting trustee, a bill was filed by all the children against the three trustees for the purpose of making them each responsible:—*Held*, that inasmuch as it was the duty of the three trustees to have explained to their cestuis que trust what their rights were, and as they had not done so, there was nothing in the conduct of the children to deprive them of their remedy against the three trustees, who were accordingly declared to be jointly and severally liable to make good the deficiency. *Burrows v. Walls*,

233

2. An executrix, by a deed, reciting that she intended to appropriate a part of her testator's assets in payment of a debt due from him to her, declared trusts of the fund intended to be thus appropriated. She died without making the appropriation, which was made after her decease by her executors.

New trustees of the deed, subsequently appointed, executed a declaration of trust (contained in the deed appointing them), whereby they declared that they would hold the fund upon the trusts. On their inquiring, before their appointment, for evidence in verification of the recital as to the existence of the debt from the testator to the executrix, none could be discovered:—*Held*, by Lord Justice Turner, agreeing with Vice-Chancellor Wood (dissentiente Lord Justice Knight Bruce), that the trustees could not be compelled to execute these trusts without further evidence of the settlor's title to appropriate the fund. *Neale v. Davies*,

258

3. Trustees of a bond debt, on the bankruptcy of the obligor, concurred with his other creditors in consenting to the fiat being annulled on the payment of a composition. On the transaction being impeached some years afterwards by cestuis que trustent, who were under disabilities:—*Held* (confirming the decision of Vice-Chancellor Kindersley) *dubitante*, Lord Justice Turner, that the trustees were liable to make good the full amount of the debt; it being impossible to show that the bankrupt would have obtained his certificate, or that the debt might not have been recovered in full. *Wiles v. Gresham*,

770

*See ACQUIESCENCE.*

SOLICITOR, 2, 3.

VENDOR

## VENDOR AND PURCHASER.

1. By an agreement for the sale of a reversionary estate in fee, it was stipulated, that a statement in a deed of 1836, to the effect that a life annuity granted to *A. B.* had not been paid or claimed for eight years (supported by a declaration of the vendor that no claim had been made upon him since 1841, and that he believed that the annuity had not been claimed for the last twenty years), should be conclusive evidence that the annuity had determined. It appeared that the annuity was granted by a person entitled in reversion, and was granted for the life of the survivor of four persons, two at least of whom were living:—*Held*, that the omission to state these circumstances disentitled the vendor to enforce the stipulation in a specific performance suit instituted by him. *Drysdale v. Mace*, 103
2. Misrepresentations, to constitute sufficient grounds for setting aside a purchase, must be material, as being of such a nature as, if true, to add to the value, must not be evidently merely conjectural statements, and must be made without a belief in their truth or without reasonable grounds for such a belief.

Where advertisements for the sale of shares in a mine had been issued containing unfounded statements, but the purchaser had not relied upon them, and had had opportunities of judging of their accuracy:—*Held*, that he was not

entitled by reason of them to have the contract rescinded.

In suits to rescind contracts for fraud, particularly where the subject is of variable value, it is the duty of the Plaintiff to put forward his complaint at the earliest possible period. *Jennings v. Broughton*, 126

3. Where conditions of sale provide that interest shall be paid by the purchaser from a fixed time if the completion should be delayed by any cause whatever, delay merely occasioned by the state of the title, and not wilful on the part of the vendor, falls within the provision.

Where in addition to such a provision there were stipulations that the vendor might rescind on the title being objected to, and that if a good title should not be made to a defined proportion of the property, compensation should be allowed:—*Held*, that the non-delivery of a complete abstract, at a time fixed by the conditions, would not of itself exempt the purchaser from payment of interest.

Where the execution of an agreement fixing a time for completion, and requiring payment of interest in case of delay, was intercepted by negotiations, ending in an alteration of the agreement, but not of the time for completion:—*Held*, that in fixing the period for the payment of interest, this circumstance ought to be regarded.

A vendor who has to account to the purchaser for rents and profits

profits from the time fixed for completion is not, unless a special case be made, liable to account for sums which he might have received but for his wilful default, nor entitled to an inquiry as to repairs or lasting improvements.

In fixing occupation rent to be paid by a vendor in such circumstances, it is not according to the course of the Court to insert in the decree a provision respecting income tax, any just allowance, in that respect, being comprehended in the general and usual words. *Sherwin v. Shakspear*, 517

4. The Plaintiff employed a broker to sell railway shares, and the broker employed an auctioneer, who sold the shares by auction to the Defendant. A few days after, the Defendant employed the same auctioneer to resell the shares which were accordingly sold by him to a third party, whose name was handed in to the Plaintiff's broker for the purpose of preparing the deed of transfer, which was thereupon executed by the Plaintiff conveying the shares to such third party, who refused to complete the contract by registering the shares in his name. One year after this sale, during all which time the Plaintiff was ignorant that the Defendant had been the original purchaser, (the shares remaining in the Plaintiff's name and calls having been made,) he filed his bill for specific performance against the Defendant:—*Held*, that having

executed the deed of transfer to the third party, the privity of contract between the Plaintiff and Defendant no longer existed, and the bill was accordingly dismissed.

*Shaw v. Fisher*, 596

See LIMITATIONS, STATUTE OF, 2.  
PUBLIC COMPANY, 2.

## VOLUNTARY SETTLEMENT.

In *December* 1845 the Plaintiff obtained a judgment against his debtor, who in the same month, being otherwise largely indebted, conveyed his reversionary interest in certain real estate to trustees, upon trust for sale, and to hold the proceeds, in default of a joint appointment by himself and his wife, for the benefit of his wife and child; in *May* 1846 a settlement of the proceeds of the sale was made in favour of his wife and child. Previously to the execution of the settlement, the Plaintiff had sued out a writ of outlawry against the debtor who had absconded, and on his return in *May* 1852 the Plaintiff filed the present bill against him, the cestuis que trust and trustees of the settlement of *May* 1846, for the purpose of impeaching it as voluntary. After the institution of the suit the debtor was declared insolvent, and his assignee was made a party to the cause. The Defendants, the trustees and cestuis que trust of the settlement, alleged in their answers that the settlement of *May* 1846 was in pursuance of the previous



vious deed of *December 1845*, and at the bar objected, that having regard to the outlawry, the Plaintiff ought to have clothed himself with the legal title by a grant from the Crown; that he ought also to have obtained a charging order under the 12th section of the Act 1 & 2 *Vict. c. 110*; and that the judgment debtor having become insolvent, the right of suit was in his assignee:—*Held*, declaring that the settlement of *May 1846* was void against creditors, first, that the objection as to the want of a grant from the Crown was invalid, because the Plaintiff's claim was paramount to the settlement, which was good as against the insolvent, whose estate only vested in the Crown; secondly, that inasmuch as the funds which formed the subject of the settlement were in the names of trustees, not for the insolvent but for others, the proceeding by charging order would have been nugatory; and thirdly, that the insolvency having occurred after the institution of the suit, the frame of the suit was right. *Goldsmith v. Russell*, 547

#### WILL.

1. A testatrix bequeathed the interest of Long Annuities to her sisters, and in case of one or both of their deaths before hers, gave "the whole of interest in Long

Annuities" to her brother for life. At his death, half of the interest she gave to a daughter of the brother till she attained twenty-one, and "then to receive half of the capital." Likewise the testatrix bequeathed to a son of her brother the other half:—*Held*, on the construction of the whole will, that the bequests to the niece and nephew were not contingent upon the sisters' deaths in the testatrix's lifetime. *Boosey v. Gardener*, 122

2. Bequest to *A. M.*, a married woman, of an annuity "for her life, and the issue from her body lawfully begotten, on failure of which to revert to my heirs," with a request that *K.* and *C.* would act as trustees for *A. M.*, so that the annuity might be secured for her sole use and benefit:—*Held*, by the Lord Chancellor and Lord Justice Turner, Lord Justice Knight Bruce giving no opinion on the point, that *A. M.* took an interest for life only, with a gift in the nature of a remainder to her issue.

*Held*, by the Lord Justice Turner, that, according to the true construction of the devise, the life interest of *A. M.* was merely equitable and the interest of the issue legal, and that therefore *A. M.* could not have taken an estate tail even if the devise had been of real estate; and also, that, admitting the annuity to partake of the nature of real estate, it did not follow that, in construing the will, it ought to be treated as real estate, for that it was in fact personal estate

estate, with peculiar incidents belonging to it in that character.

There is nothing in the decisions relative to the limitations of personal estate by which an absolute interest has been held to be given to the first taker, which obliges the Court, in construing bequests of personalty, where technical words are not used and the interest of the first taker is expressly confined to a life estate, to act on principles derived from laws of tenure and not resting on intention.—*By the Lord Chancellor.*

The Court, in construing a disposition by will of personal estate, is not to be absolutely governed by the rules which would be applied at law in the case of real estate.—*By the Lord Justice Turner.*

The decision of Lord Thurlow in *Knight v. Ellis*, 2 Bro. C. C. 570, approved of and held not to have been overruled; and the cases of *The Attorney-General v. Bright*, 2 Keen, 57; *Tate v. Clarke*, 1 Beav. 100; *Jordan v. Lowe*, 6 Beav. 350; and *Bird v. Webster*, 1 Drew. 338, commented upon.—*By the Lord Chancellor and the Lord Justice Turner. Ex parte Wynch*, 188

3. A testator devised lands for life, with contingent remainders over, and then devised other lands to another tenant for life, with contingent remainders over, and charged the latter lands with the payment of a mortgage on the former lands, and also with his debts generally, but gave no ex-  
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press power of sale:—*Held*, that the executor took a power of sale by implication, and that after a sale of the latter lands by the executor, the devisees of the former had no equity against the purchaser in respect of the charge of the mortgage debt. *Robinson v. Lowater*, 272

4. A testator bequeathed a sum of stock in trust for a daughter for life, and in case there should be no child of the daughter living at her decease, or being such, they should all die under twenty-one, then the testator bequeathed the stock unto all and every his children then living, and the child or children of such of his said children as should be then dead, in equal shares, but so that such his grandchildren should only have among them such share as their parents would respectively have been entitled to in case they had been then living:—*Held*, that children of a child of the testator, known by him to be dead at the date of the will, did not take any interest. *Re Thompson's Trusts*, 280

5. Under the following bequest, "to my brother, J. T., the whole of my money for his life, at his death to be divided between my two nieces, Rebecca and Mary L., my clothes to be likewise divided between them, my watch and trinkets for my niece, Mary L. I likewise declare the longest survivor of the above-mentioned nieces is to become possessor of the whole money:—"

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D. M. G.

money:—"

money:"—*Held*, that stock did not pass. *Lowe v. Thomas*, 315

6. A testator, by his will, executed three calendar months before his death, devised two houses in *Brigh-ton* to trustees, upon trust to sell and invest the purchase-money, and to pay the dividends to his wife during her life, and at her death to make over and transfer the principal sum so invested to the treasurer for the time being of the Incorporated Society for promoting the Enlargement, Building and Repairing of Churches and Chapels, to be applied to the uses and purposes of that society:—*Held*, that such a gift was not within the scope of the Act 43 *Geo. 3*, c. 108, and could not be sustained either in its entirety or as a gift of the proceeds of the sale to the extent of 500*l.*, but was void under the Act 9 *Geo. 2*, c. 36.

The Act 43 *Geo. 3*, c. 108, was passed with a view of authorizing limited dispositions of land by deed or will in favour of the charitable uses therein specified, but the intent of the legislature was that the gift should be of specific lands for one or other of the specific purposes indicated in that Act, and therefore a gift of the proceeds of land is not within the protection of that Act, but is obnoxious to the provisions of the Statute of Mortmain, 9 *Geo. 2*, c. 36. *The Incorporated Church Building Society v. Coles*, 324

7. A testator gave the residue of his

estate to trustees, who were also his executors, desiring them, immediately after his decease, to convert all his personal estate into money, and to invest the amount "in the Bank of *England*," and to permit his daughter to receive the rents and profits, dividends or "other annual produce" of his personal estate for her life, for her own use, and after her death the property was to go to her children equally. The testator died in 1825, possessed of, among other things, 24*l.* Long Annuities, which the executors did not convert, but permitted the tenant for life to enjoy in specie. On the death of the survivor of the executors, his executors also neglected to convert the Long Annuities. The tenant for life had represented, both to the original executors and to the executors of the survivor, the propriety of a conversion. She had mortgaged her interest, and two of the children had mortgaged their shares in the residue. Upon bill filed by all the children against the executors of the surviving executor and their mother,—*Held*, that the non-conversion was a breach of trust, and that the executors must account for the difference between the value of the Long Annuities at the end of one year from the date of the testator's death, and their value when paid into Court; that the tenant for life was not liable to refund the over-payments voluntarily made to her, and that the facts disclosed

no

no case of acquiescence either on the part of the tenant for life or those in remainder. *Bate v. Hooper*, 338

8. A testator, entitled to freehold estates and to a leasehold for years, determinable on lives, charged by his will an annuity on both rateably, and directed that in the event of his interest in the leasehold expiring before the annuity, the proportion of the annuity charged on the leasehold should thenceforth issue out of a designated freehold estate. Subject to the annuity, he devised and bequeathed the freeholds and leasehold to different persons. The legatee of the leasehold surrendered the lease and took a new one determinable on different lives:—*Held*, that the new lease was not for the purpose of the annuity substituted for the old, but that on the death of the last cestui que vie named in the surrendered lease, the leasehold ceased to be charged with the annuity, and that the part apportioned to the leasehold became charged on the designated freehold. *Kempe v. Kempe*, 346

9. A bequest to a municipal corporation, to be applied by them in such manner for such purposes as they should judge to be most for the benefit and ornament of their town, is not void under the Mortmain Act.

Where trustees have by the terms of a gift a discretion to apply the benefit of it either in a way which the law allows or in one

which the law disallows, the presumption ought to be, that the discretion will be exercised in the former mode. *The Mayor, Aldermen and Burgesses of Faversham v. Ryder*, 350

10. Under a bequest (in the event of daughters dying without leaving issue) in trust for the persons who would at the time of the decease of such daughters respectively be entitled as next of kin or otherwise to the personal estate of such daughters respectively, under the statutes made for the distribution of intestate's effects:—*Held*, that the husbands of the daughters did not take. *Milne v. Gilbert*, 510
11. A testator gave his real and personal estate to trustees on trust, to sell and convert the same and pay the interest and annual produce to his ten nephews and nieces nominatim for their respective lives, and after their respective deceases the share of such nephew or niece so dying "to be held in trust for all and every the children or child of my said nephews and nieces, who being a son or sons should attain the age of twenty-one years, or being a daughter or daughters should attain that age or marry, to be divided between and amongst such last children, if more than one, in equal shares and proportions; and if any one or more of them my said nephews and nieces shall not have any child, who being a son shall attain twenty-one, or being a daughter shall attain that age or marry under it, then

then and in each or any such case as well the original share or shares of, as also the share or shares surviving or accruing to each or any such last-mentioned nephew or niece and his or her child or children, or to such child or children only in possession or expectancy, &c., shall go and accrue to and vest in the survivors or survivor or others or other of them my said nephews and nieces and their respective children, at and in such and the same times, shares and proportions and manner as are hereinbefore expressed of and concerning their respective original shares," &c. One of the nephews having died, leaving an only child, an infant,—*Held*, that such only child exclusively became presumptively entitled to his father's share, subject to its going over as provided by the will in the event of his dying under twenty-one without children. *Hunt v. Dorsett*,

570

12. A testator by his will limited certain real estate to trustees for a term of 500 years, upon trust in a certain event to raise 20,000*l.* and to stand possessed as to one-fourth part thereof "upon such trusts as are hereinafter declared touching the sum of 20,000*l.* Three-and-a-half per Cent. Consolidated Bank Annuities hereinafter bequeathed in trust for the benefit of my son *W. F. H.*, his wife, children and issue as hereinafter mentioned:" in a subsequent part of his will he directed other trustees to stand

possessed of a sum of 20,000*l.* Three-and-a-half per Cent. Consolidated Bank Annuities upon trust to pay the dividends, interest and annual produce to his son *W. F. H.* and his assigns during his life, and after his decease in trust during the widowhood of *E.* his wife to pay her out of the interest, dividends and annual produce the clear yearly sum of 200*l.*, but if she should marry again, then after her second marriage to pay to her separate use free from the debts and engagements of any her future husband the clear sum of 100*l.* only during the then remainder of her natural life, and after the death of his son *W. F. H.* subject to the said provision for his wife upon trusts for the children of his son *W. F. H.* :—*Held*, reversing the decision of the Master of the Rolls, that the widow of the testator's son *W. F. H.* took only one annuity of 200*l.*

A trust created by reference to other trusts ought not, generally speaking, to be so read as to create a duplication of charges. *Hindle v. Taylor*,

577

13. The expression "This is my last will and testament" does not operate as a revocation of a former will, without words to that effect, as regards real estate. *Freeman v. Freeman*,

704

14. The words "from and immediately after his decease" following a limitation for life, in general point out the order of limitation merely. Where therefore a tes-

tator

tator revoked a limitation for life, which was followed by those words, introducing subsequent limitations, —*Held*, that the remainders were accelerated. *Lainson v. Lainson*,

754

15. An appointment expressed to be made in exercise of every power enabling the appointor, does not extend to property which the appointor cannot appoint without the exercise of a power of revocation, unless there be no other property to which the appointment can apply.

Therefore, where the donee of a power under a settlement to be exercised by deed or will, partially exercised it by deed, reserving a power of revocation, and afterwards by her will, by virtue of every power contained in the settlement, or "otherwise howsoever," appointed all the real and personal estate which under the settlement, or otherwise, she had power to appoint:—*Held*, that the will operated on the unappointed part only, and was not an exercise of the power of revocation and new appointment. *Pomfret v. Perring*,

775

*See ELECTION.*

#### WINDING-UP ACTS.

1. *Seemle*, that where an "alleged contributory" (not settled on the list) is summoned as a witness, his travelling expenses ought to be tendered to him.

Where an "alleged contributory," who declined to sign a pro-

posed admission of his execution of the Company's deed, was served with a summons to attend as a witness, and did not demand his expenses, but disobeyed the summons, and there appeared every probability of his being a contributory:—*Held*, that he was not entitled to the costs of a motion to commit him, which it became unnecessary to dispose of on the merits, from his making, in Court, the required admission. *Mercer's Case*,

26

2. By the subscribers' agreement of a provisionally registered Railway Company, the subscribers (who were expressed to be parties of the first part) covenanted with trustees (who were expressed to be parties of the second part) that they would indemnify the managing directors (who were expressed to be parties of the third part, as distinct parties, and also to be among the parties of the first part). Preliminary prospectuses were circulated, naming the managing directors, among whom was *F.* (who was named also in the deed as one of the parties). *F.* never agreed to be connected with the undertaking, but expressly declined to be so. None of the managing committee paid any money or executed the deed. On the company being wound up:—*Held*,
  1. That a call on the subscribers, exclusively of the managing committee, as primarily liable under the covenant for indemnity, ought not to have been made.
  2. That, on a motion of some of the subscribers

scribers to discharge a call, the Court could not properly make an order staying all proceedings under the winding-up order, and directing the official manager to repay all monies which he had received, the notice of motion not seeking such an order, and some of the respondents, who were served, not having appeared. 3. That the official manager was entitled to appeal from the order. 4. *Semble*, that the order to stay all proceedings could not have been properly made without the creditors who had proved, and the subscribers who had overpaid, being before the Court. 5. That the absent parties were not sufficiently represented by the official manager.

Leave having been given to serve with notice of an appeal, from an order staying all proceedings made on a motion to discharge a call, a member of the committee, who had not been served with the original motion to discharge the call:—*Held*, that he could not object that the appeal was out of time. *Carew's Case*, 94

3. By the subscription contract of a provisionally registered Railway Company the managing committee were empowered to appoint engineers, and to enter into any contracts for making the proper surveys, and taking all necessary measures with a view to the application to Parliament for carrying the project into effect, and the subscribers covenanted that in the event of the application to Parlia-

ment being unsuccessful, they would pay and discharge all the costs and expenses which should have been incurred with a view to the promotion of the undertaking. The application to Parliament failed, the Company was ordered to be wound up, and an engineer employed by the committee tendered a proof against the Company under the winding-up order:—*Held*, that the debt (if any) was one due from the Company, proveable under the winding-up order, and an action having been brought under the direction of the Court to determine the amount due, the official manager was directed to admit that the debt was due from the Company. *Held*, also, that on the official manager failing to obtain funds under the winding-up order to meet the demand, the creditor was entitled to proceed at law on the judgment so obtained, and leave was, on appeal, given for that purpose. *In re London and Birmingham Extension, &c. Railway Company, Pritchard's Case*, 484

4. Where a person claimed to be a creditor of a provisionally registered Railway Company ordered to be wound up under the Winding-up Acts,—*Held*, that he was entitled to adduce before the Master such proofs as he had in support of his demand, and to have the Master's judgment whether upon such proofs it ought to be admitted as a claim only, or as a proof, although no list of contributories

tributories had been settled. *In re Warwick and Worcester Railway Company, Prichard's Case*, 495

5. Where a claim was made to prove a demand as a debt under the Winding-up Acts against a Company which was not authorized to be sued by any public officer, and the materials before the Court were not such as to enable it to decide upon the demand:—*Held*, that it was competent to the Court under the Winding-up Acts to direct a claim merely to be admitted until the claimants established their demand at law; but that for that purpose the claimants ought to have liberty to take such proceedings at law as they might be advised, and ought not to be directed to bring an action against the official manager. *East of England Banking Company's Case*, 505
6. In 1851 a managing director of a provisionally registered projected Railway Company submitted to be placed on the list of contributories under the Winding-up Acts, on the authority of *Upfill's Case*. On a call being made in 1854 on him and other contributories for the costs of winding-up the Company, he appealed, and at the same time moved that his name might be removed from the list of contributories on the ground of the law being changed by *Bright's Case*. The Vice-Chancellor (having directed the notice of motion to be served on the other contributories

and the creditors who had proved) made an order staying all proceedings under the winding-up order:—*Held*, first, that such an order could not properly be made on the motions before the Vice-Chancellor, some of the persons served not having appeared; secondly, that *Bright's Case* having been decided in 1852, the application of the contributory in 1854 to be relieved from his submission to be placed on the list was made too late; thirdly, that the call for costs would have been properly made if there had been a proper list of contributories; but, fourthly, that there being no list properly settled, but merely one having in many instances informal abbreviations placed opposite the names in the list, and in others marks importing that the case of the person named was adjourned, without showing that it could not have been disposed of, no call could in that state of the proceedings be properly made; fifthly, that persons who have notice of a compromise between the official manager and any contributories, must, if they wish to disturb it, take proceedings at once for that purpose. *Underwood's Case*, 677

7. Where one contributory having agreed to pay all debts proved before the Master and the costs of winding-up a Company, obtained an order to stay all proceedings under the winding-up order, without serving with notice of his application claimants who had tendered



dered before the Master proofs of alleged debts which had stood over for further investigation:—*Held*, that the claimants were entitled to have this obstruction to their proceedings removed, and to have the Master's judgment on their claims.

The official manager not having informed the Court of these claims when the order staying proceedings was made, was not allowed his costs of the subsequent application. *Clifton and others' Cases*, 743

See PUBLIC COMPANY, 1, 5.

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## ERRATA.

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### VOL. III.

Page 174, lines 3 and 4, dele brackets.

„ 178, line 5 from bottom, *for* "The order of the Commissioner must be reversed,"  
*read* "It must be referred back to the Commissioner to review his decision."

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### VOL. IV.

Page 63, line 6, *for* "instrument," *read* "instruments."

„ 65, line 6, *for* a comma, a full stop.

„ 67, line 15, dele last "the."

„ „ last line, dele first "the."

„ 149, line 12, *for* "Crowcher's," *read* "Hartley's."

„ 180 and 181, omit last sentence of statement.

„ 785, line 12, *for* "appointment," *read* "apportionment."

„ 896, line 7, dele "not."





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